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*Proceedings in the United States Court of Appeals for the Ninth Circuit*

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In the United States Court of Appeals for the Ninth Circuit

No. 17608

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

*v.*

FEDERAL POWER COMMISSION, RESPONDENT

*Petition to review and set aside an order of the Federal Power Commission—filed November 6, 1961*

[File endorsement omitted]

*To the Honorable the Judges of the United States Court of Appeals for the Ninth Circuit:*

Petitioner, Southern California Edison Company, being aggrieved by Opinion No. 346 (Opinion and Order Determining Jurisdiction) issued by the Federal Power Commission on July 31, 1961, and by the Order Denying Rehearing and Granting Stay issued by said Commission on September 14, 1961, said opinion and orders being in Federal Power Commission Docket No. E–6821, entitled City of Colton, California v. Southern California Edison Company, respectfully petitions this Court to review and set aside those orders.

Petitioner, Southern California Edison Company, referred to herein as Edison, is a public utility corporation incorporated under the laws of the State of California, engaged in the business of generating, transmitting, distributing and selling electric energy in public service in the central and southern portions of said State.

Respondent, Federal Power Commission, referred to herein as Power Commission or FPC, is an independent commission established pursuant to the Federal Power Act, 16 U.S.C. Section 791a *et seq.*

City of Colton, referred to herein as Colton, is a municipal corporation organized and existing under the laws of the State of California and located in the County of San Bernardino in said State.

This petition is filed under and pursuant to Section 313 of the Federal Power Act, 16 U.S.C. Section 825*l*, which provides in part:

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part."

Edison is a party to the Federal Power Commission's Docket No. E–6821 below, the proceeding to be reviewed by this Court, and is aggrieved by the aforementioned opinion and orders therein relating to it as a public utility. Edison is located and has its principal place of business in the City and County of Los Angeles, State of California, within the Ninth Judicial Circuit and within the jurisdiction of this Court.

This petition is filed within sixty (60) days after issuance by the Federal Power Commission on September 14, 1961, of the Order Denying Rehearing and Granting Stay referred to hereinabove.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

On May 9, 1958, Colton filed with the FPC a petition which was docketed as In the Matter of City of Colton, Calif. vs. Southern California Edison Company, Docket No. E–6821, seeking a determination that Edison's sales of electric energy to Colton pursuant to a contract dated October 1, 1945, were and are subject to FPC jurisdiction. Said petition asked the

FPC to issue an order requiring Edison to file said contract, to cease and desist charging rates other than those set forth as the beginning rates in said contract, and to require Edison to account for and make refund to Colton of the difference between those beginning rates and higher rates charged by Edison under said contract pursuant to decisions of the California Public Utilities Commission issued in 1954 and 1957 respectively.

Edison filed its answer to said petition on June 9, 1958, denying jurisdiction by the FPC over the sales in question and stating that the sales had at all times been subject to the jurisdiction of the California Public Utilities Commission and had at all times been regulated by that Commission. Edison also filed a motion to dismiss on December 2, 1959. The California Public Utilities Commission (referred to herein as California PUC) intervened and filed its own motion to dismiss. Hearings were held before Examiner Frazee of the FPC on December 8, 9 and 10, 1959, and on May 3, 4, 5, 6, 9 and 10, 1960.

Thereafter, following the submission of briefs, Examiner Frazee issued his decision on March 14, 1961, copy of which is attached hereto and incorporated herein as Exhibit "A" sustaining the motions to dismiss and dismissing Colton's petition on the ground that the FPC had no jurisdiction over the sales in question.

Exceptions to said decision were filed, and thereafter the FPC issued on July 31, 1961, its Opinion No. 346, copy of which is attached hereto and incorporated herein as Exhibit "B", reversing Examiner Frazee and declaring that the FPC had jurisdiction over the sales except for that portion relating to deliveries to Colton for pumping. The FPC ordered Edison to file the 1945 contract aforesaid, to cease and desist charging Colton other than the beginning rates of such contract, to account for monies collected by Edison over and above such beginning rates, to establish a special reserve for such difference, together with interest, and to file the computation of such special reserve amounts and accounting entries establishing such reserve, together with a proposed plan for the disposition of such special reserve.

Petitions for rehearing were filed by Edison on August 21, 1961, and by the California PUC on August 22, 1961, pursuant to Section 313(a) of the Federal Power Act (16 U.S.C. 825*l*). Thereafter on September 14, 1961, the FPC issued its Order

Denying Rehearing and Granting Stay, extending the time within which Edison would have to comply with ordering portions of said Opinion No. 346. Said Order Denying Rehearing and Granting Stay is attached hereto and incorporated herein as Exhibit "C".

GROUNDS UPON WHICH REVIEW IS SOUGHT

Edison seeks review before this Court and a determination that the FPC has no jurisdiction over any portion of Edison's aforementioned sales to Colton and that the FPC's orders premised upon such finding of jurisdiction are unlawful and must be reversed and set aside. Edison asks such determination upon the following grounds, all of which were urged before the Commission by Edison in its petition for rehearing and may therefore be considered by this Court, in accordance with the provisions of Section 313(b) of the Federal Power Act (16 U.S.C. 825*l*):

1. Edison's sales of electric energy to Colton for resale are not in interstate commerce, there being no substantial evidence upon which to base a finding that electric energy generated outside the State of California and received by Edison has ever been delivered to Colton. Accordingly, FPC jurisdiction is precluded. Federal Power Act, Sections 201(a), 201(b) (16 U.S.C. Section 824).

2. The Boulder Canyon Project Act (45 Stat. 1057) and the Boulder Canyon Project Adjustment Act (54 Stat. 774) which legislate with respect to the only out-of-state energy received by Edison preclude jurisdiction of the FPC over Edison's sales of any such energy within California and vest jurisdiction in the Secretary of the Interior in the absence of regulation by the California PUC.

3. Edison's sales to Colton for resale are a matter of local concern and do not involve the interests of any state except California. Therefore there is no constitutional inhibition against the exercise of jurisdiction over such sales by the State of California through its Public Utilities Commission. There being no such constitutional inhibition, often referred to as an "Attleboro gap", the Federal Power Commission is expressly precluded by Part II, Section 201 of the Federal Power Act (16 U.S.C. Section 824) from exercising jurisdiction.

4. The facilities used by Edison in making its sales of electric energy to Colton for resale are "used in local distribution

within the meaning of Section 201(b) of the Federal Power Act. Such sales through facilities used in local distribution are exempted from jurisdiction of the FPC.

5. The flow of such out-of-state electric energy into Edison's system has been trivial and its availability has continued to decrease and the Commission should have declined to assert jurisdiction regardless of other considerations.

In this connection it should be pointed out that Edison in its petition for rehearing stated under oath that by reason of changed circumstances of a non-temporary nature which had arisen since the hearing, out-of-state energy is not delivered to Colton, and cannot be said to be delivered to Colton even upon the FPC's erroneous theories of tracing, and the issue of jurisdiction has in fact become moot. Edison requested opportunity, upon a rehearing, to present evidence of such changed circumstances. The Power Commission in its Order Denying Rehearing issued September 14, 1961, denied such request upon the assumption that the future "can be brought before us in another proceeding". Such action was arbitrary and unlawful since it ignores the necessary effect of the ordering portion of Opinion No. 346 upon substantial future periods. Orderly procedure requires that the Power Commission be directed to reopen the present proceeding and take evidence on the changed circumstances of a non-temporary nature which have occurred since hearing.

In addition to the foregoing grounds, any one of which is sufficient by itself to establish that the FPC erred in making a finding of jurisdiction over Edison's sales to Colton, the following additional grounds, all of which were urged by Edison in its petition for rehearing, are relied upon. These grounds assume for argument only, that the FPC could lawfully make a finding of jurisdiction over Edison's sales to Colton:

6. It was confiscatory, discriminatory, and unlawful, as well as being an abuse of discretion, for the FPC, under purported authority of Federal Power Act, Section 205, 16 U.S.C. Section 824d, to order that Edison reduce its rates to Colton to the level of the beginning rates of the 1945 contract, that such reduced rates be applied retroactively for the period beginning July 1, 1954, and that Edison cease and desist charging the rates prescribed by the California PUC under said contract which were in effect at the time of the FPC's order, because:

(a) As a matter of contract law, the rates which Edison has charged to Colton have at all times been the applicable rates under the 1945 contract since the 1945 contract expressly provided for such rate changes as might be prescribed by the California PUC. Edison has charged no other rates than as contemplated and provided for in the 1945 contract.

(b) Evidence establishing the proper interpretation of the 1945 contract between Edison and Colton aforesaid, and the course of Colton's conduct with respect thereto, would show, along with evidence now on record, that the rates presently being charged to Colton are applicable to service under the 1945 contract and are not in excess of rates which Edison has been lawfully entitled to collect, that Colton was estopped to deny the validity of the increased rates prescribed by the California Public Utilities Commission in 1954 and 1957, and that in any case the decisions of the California Commission are *res judicata* respecting the proper rates to be charged under the 1945 contract. Findings to the contrary by the Federal Power Commission on each of these points are unsupported by substantial evidence in the record.

(c) The FPC arbitrarily and unlawfully refused to receive evidence as referred to above establishing the proper interpretation of the 1945 contract and the course of Colton's conduct with respect thereto. While in its Order Denying Rehearing the Commission partially corrected such arbitrary and unlawful action by reversing itself in part and permitting Exhibits 24 and 25 to be received, the Commission ignored Edison's request that oral testimony as well (which Edison had previously sought to present) be received on rehearing, establishing the proper interpretation of the 1945 contract and Colton's conduct with respect thereto.

(d) The FPC arbitrarily and unlawfully failed to give any recognition whatever to Edison's right, duly brought to the FPC's attention by Edison, to rescind the 1945 contract for material mistake of fact and law in the event jurisdiction ultimately be found to lie in the FPC rather than in the California PUC as the parties believed to be the case at the time of entering into the contract, and the FPC premised its orders accordingly. In addition to the reduction in rates to be applied retroactively and the cease and desist order hereinabove referred to the FPC ordered that Edison account for the difference between amounts collected for resale service to Colton

from July 1, 1954 to October 1, 1961, and amounts determined by rebilling at the beginning rate of the 1945 contract for that period. Such order required that Edison establish a special reserve account for such difference (together with interest), that Edison file a computation of such difference and accounting entries establishing the special reserve, and that Edison file a proposed plan for the disposition of such special reserve.

(e) The orders of the FPC subject Edison to confiscation because Edison will have been compeled to charge Colton for electric energy at rates lower than the rates agreed upon between the parties and lower than rates which may be found to be just and reasonable.

Edison has in fact filed in the Superior Court of the State of California in and for the County of San Bernardino Complaint for Rescission and Restitution, for Declaratory Relief and for Reformation, Docket No. 107169, copy of which is attached hereto and incorporated herein as Exhibit "D".

(f) Edison having at all times acted in good faith, and upon reasonable belief that no jurisdiction lay in the FPC, it was arbitrary and unlawful, and an abuse of discretion, to order that the beginning rates of the 1945 contract be applied retroactively to the period beginning July 1, 1954 and thereafter, and that an accounting be made for monies collected in excess of such beginning rates. Rather the FPC should have ordered, assuming it had jurisdiction, that the rates being charged by Edison at the date of determination of jurisdiction by a court of last resort be the effective rates to be charged until changed by filing under Section 205 or modification under Section 206 of the Federal Power Act, and that no accounting be required for past periods. Such order would have been in line with numerous other orders of the FPC in proceedings where the jurisdiction of the FPC has been in doubt over an extended period. It was arbitrary to single Edison out for different treatment, thereby producing confiscation to Edison and a windfall to Colton.

7. The FPC arbitrarily and unlawfully ordered Edison to account, and set up a special reserve, for the difference between the beginning rates of the 1945 contract and the rate increases which were collected on and after September 13, 1954, pursuant to such contract and the authorizations by the California PUC. The FPC also exceeded its jurisdiction and acted arbitrarily and unlawfully in ordering the filing of a plan for disposition of such reserve.

All of this action constitutes in effect an attempt by the FPC to award reparation, a power which the FPC is precluded from exercising under express rulings of the United States Supreme Court. Furthermore, the record is devoid of evidence, or even claim, that the rates charged by Edison to Colton have at any time been unjust, unreasonable, discriminatory, or preferential. The evidence shows that the rates collected by Edison have been just and reasonable and any refund would therefore be a complete windfall to Colton and would constitute the imposition of inequitable and unjustifiable punitive damages on Edison; the net effect of any refund would be to make retroactive a rate for service to Colton which would be discriminatory and constitute an undue preference to Colton; and an order for refunds would be confiscatory for the reason that Colton would, in effect, have received electric service at rates which Edison can show would not produce revenue equal to the cost of service.

Wherefore, petitioner respectfully prays:

1. That a certified copy of this petition be transmitted by the Clerk of this Court to a member of the respondent, the Federal Power Commission.

2. That respondent, in conformity with Section 313(b) of the Federal Power Act, be required to certify and file with this Court the record upon which the opinion and orders here complained of and sought to be reviewed were entered.

3. That the Federal Power Commission's Opinion No. 346 and accompanying order of July 31, 1961, and the order of September 14, 1961, denying rehearing and granting stay, be reviewed and found to be unlawful upon the ground that Edison's sales of electric energy to Colton are beyond the jurisdiction of said Commission, and that such opinion and orders be set aside.

4. That in the event the Court should find the sales in question to be within the jurisdiction of the Federal Power Commission, said opinion and orders be modified to state that the rates which Edison has charged to Colton have at all times been lawful, that Edison shall not be required to account for, or set up a special reserve for, or file any plan for the disposition of, the difference between the beginning rates of the 1945 contract and rate increases collected under such contract pursuant to authorizations of the California Public Utilities Commission for service on and since September 13, 1954, that Edison

not be required to make any refund of such difference, and that Edison be authorized to file as its initial rates under Section 205(c) of the Federal Power Act those rates which it is charging to Colton at the time of the decision of this Court, or at the time of final action by the United States Supreme Court in the event this proceeding is brought before that Court on writ of certiorari.

Petitioner further respectfully prays, in the event jurisdiction of the Federal Power Commission is determined by this Court to have been lawfully found upon the record thus far made, for leave, pursuant to Section 313(b) of the Federal Power Act, to introduce additional evidence of changed circumstances of a non-temporary nature which have arisen since the taking of evidence before the Commission and which Edison could not reasonably have adduced in the proceedings before the Commission at an earlier date. Such evidence would be material and would establish, even upon the reasoning of the Federal Power Commission in the opinion and orders below, that there is no longer basis for exercise of jurisdiction by that Commission.

Dated: November 6, 1961.

Respectfully submitted,

SOUTHERN CALIFORNIA EDISON COMPANY,

/s/ ROBERT P. O'BRIEN, *Vice President.*

ROLLIN E. WOODBURY,
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*Attorneys for*
*Southern California Edison Company.*

[Certificate of service omitted in printing]

*(Exhibit "A" to petition to review, etc.)*

**United States of America, Federal Power Commission**

DECISION

**Docket No. E-6821**

CITY OF COLTON, CALIFORNIA

*v.*

SOUTHERN CALIFORNIA EDISON CO., OPERATOR

## *UPON PETITION OF THE CITY OF COLTON UNDER THE FEDERAL POWER ACT*

(Issued March 14, 1961)

APPEARANCES

*For the City of Colton, California:* John W. Cragun, Reuben Goldberg, Richard R. Wilkins, Washington, D.C.; Lyman H. Cozad, Colton, California.

*For Southern California Edison Company:* Rollin E. Woodbury, Harry W. Sturges, Jr., John R. Bury, Los Angeles, California; Boris H. Lakusta, San Francisco, California.

*For California Public Utilities Commission:* Karl K. Roos, William M. Bennett, Mary Moran Pajalich, San Francisco, California.

*For the Staff of the Federal Power Commission:* John S. Everett, Jr., Washington, D.C.

FRAZEE, *Presiding examiner:* The City of Colton (Colton) in a petition filed on May 9, 1958, requested the Federal Power Commission (FPC) to institute an investigation to determine if the sale of electrical energy by the Southern California Edison Company (Edison) to the City of Colton for resale is a sale subject to the jurisdiction of the Federal Power Commission.

The Public Utilities Commission of the State of California (PUC) filed a notice of intervention herein, in which it asserts the sale of electrical energy by Edison to Colton is subject to the jurisdiction of the PUC and not to the FPC.

Edison filed its answer to Colton's petition denying the jurisdiction of the FPC and praying the petition be dismissed.

The City of Colton is a municipal corporation. It is located in San Bernardino County, State of California. Colton owns

and operates a municipal electrical distribution system but has no generating facilities. Colton purchases its entire electrical requirements, for its own use and for resale, from Edison. Colton's present contract with Edison is dated October 1, 1945, under which it agrees to purchase all of its electrical energy requirements from Edison at rates and charges therein set forth subject, however, to such changes or modifications as the PUC may direct from time to time in the exercise of its jurisdiction over both Colton and Edison. Upon expiration of its 10-year term the contract automatically continues in effect from month to month until terminated by either party on written notice. By its terms the contract was to be filed with the PUC and be controlled by the rules and regulations of Edison on file with and approved by the PUC. On the record herein, it is shown the PUC has at all times exercised jurisdiction over all of Edison's rates, charges and contracts with Colton.[2] Edison continues to furnish and Colton continues to purchase all of its electrical energy requirements under said contract, as amended at the direction of PUC in August, 1954, and October, 1957, requiring Edison to file revised tariff schedules applicable to Colton.[3]

The Southern California Edison Company is a California corporation and engaged in the production and marketing of electrical energy in central and southern California, it markets no electricity outside the State. Its company-owned production facilities consist of steam and hydro plants, all located in California. In addition Edison receives an allocation of electrical energy produced at the Hoover Dam power plant which is located outside the State of California.

Edison's electrical energy production facilities are interconnected by a high voltage—220 kv[4]—transmission system. This high voltage electrical energy is stepped down at numerous transmission substations from 220 kv to a 66 kv subtransmission system over which bulk electrical energy is supplied to distribution substations in the local communities served by Edison. At these distribution substations the electrical energy is stepped down from 66 kv to 16 kv, or 12 kv, or 7 kv, or 4 kv as required.

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[1] See Ex. 30.

[2] PUC Decision No. 50,449, August 17, 1954, 53 Cal. PUC 385; and PUC Decision No. 55,703, October 15, 1957, 55 Cal. PUC 743.

[3] Kilovolts.

The Hoover Dam [4] was constructed by the Secretary of the Interior, Bureau of Reclamation, (USBR), under the authority of the Boulder Canyon Project Act,[5] and is the property of the United States. It spans the Colorado River in the Black Canyon between the States of Nevada and Arizona. Its power plant contains certain electrical energy generators, nine on the Arizona side and seven on the Nevada side of the river. By contracts with the United States, executed by the Secretary of the Interior under authority of the Boulder Canyon Project Act, specific generators, together with the appurtenant related facilities are assigned for the use of the States of Arizona and Nevada, the City of Los Angeles, California, the Metropolitan Water District of Southern California (MWD), Edison and others. The Edison-USBR contract being dated May 29, 1941. Seven per cent of the total firm generating capacity of the Hoover Dam power plant was allocated to Edison by the contract. This, in 1958, amounted to about 6% of the total electrical energy handled by Edison.[6]

The Davis Dam was constructed by the Secretary of the Interior, Bureau of Reclamation, and is the property of the United States. It spans the Colorado River between the States of Nevada and Arizona and is about 60 miles downstream from the Hoover Dam. The Davis Dam power plant contains five electrical generators, all are located in Arizona.

The Parker Dam was also constructed by the Secretary of the Interior, Bureau of Reclamation, and is also the property of the United States. It also spans the Colorado River between the States of California and Arizona and is approximately 150 miles downstream from the Hoover Dam. The Parker Dam power plant contains four electrical generators, all are located in California. One-half of the generating capacity from the Parker Dam power plant is allocated to MWD by contract with the USBR.

The Metropolitan Water District of Southern California is a municipal corporation, composed of 13 southern California cities, including Los Angeles, organized to construct and operate an aqueduct through which water diverted from the Colo-

[4] By Act of April 30, 1947, c. 46, the name of the dam was changed from "Boulder" to "Hoover."

[5] 43 U.S.C.A. 617 *et seq.*

[6] In 1958, Edison generated in California 14,705,420,573 kw. In 1958, Edison received 941,990,700 kwh of electrical energy from Hoover Dam power plant.

rado River at the Parker Dam would be conveyed to its members. By contract the USBR allocated 36% of the Hoover power plant generating capacity to MWD. With the energy from the Parker and the Hoover power plants, MWD operates pumping stations on its aqueduct at Intake, Gene, Iron Mountain, Eagle Mountain and Hayfield where the water is lifted to a point from which it flows by gravity into the distribution feeder system. Recognizing an increased future demand for water, MWD contracted with the USBR for more electrical energy than it then required. To the date of the hearing MWD had not required for its own use its allotment of electrical energy from the Hoover plant, electing instead to take all of its requirements from the Parker power plant allotment. Its Hoover plant allotment being assigned to Edison, with USBR consent, subject to recapture when required by MWD.

The USBR operates the power plants at the Hoover, Davis and Parker dams. A 220 kv circuit owned by the United States, interconnects these power plants. Both Edison and MWD have facilities which are connected with the USBR 220 kv circuit. MWD owns and operates a 220 kv circuit which extends from the USBR's Hoover power plant in Nevada to its Hayfield [7] substation via its Camino [8] switching station, Iron Mountain substation and Eagle Mountain substation. Another 220 kv line, one segment of which is owned by USBR and the remainder by MWD, connects the Parker Dam substation with MWD's Gene substation. Another 220 kv line, owned by MWD, extends from the Gene substation to its Camino switching station, at which point it joins, or connects with, the MWD line from Hoover to Hayfield.

Edison owns and operates two 220 kv lines which extend from the USBR's Hoover power plant in Nevada to its Chino [9] substation. Edison also owns and operates a 220 kv line which originates and is connected with the MWD line and substation at Hayfield. This line extends to Edison's Highgrove [10] substation. The Chino and Highgrove substations, which are about 15 miles apart, are each connected to and a part of Edison's transmission system.

[7] The MWD Hayfield substation is located in California.
[8] The MWD Camino switching station is located in California.
[9] The Edison Chino substation is located in California.
[10] 105 miles west of Hayfield and in California.

About 15 miles northwest of the Highgrove substation Edison owns and operates its Etiwanda steam-generating plant which produces and supplies electrical energy into Edison's high voltage transmission system. The Highgrove substation is about two miles south of Edison's Colton substation, which, with the City of Colton substation, is located within the City of Colton. By stages the electricity is stepped down in voltage from the Highgrove substation until it is delivered to the City of Colton substation for Colton's own use or for resale.

The record shows and Edison in its brief states that from time to time it receives electrical energy from MWD at Hayfield which was generated at the Hoover power plant in the State of Nevada. This energy is transmitted to its Highgrove substation [11] and from there about one-half of one per cent of Edison's total electrical energy was delivered to Edison's Colton substation from which Edison delivers energy to the City of Colton and others.[12]

The Commission Staff made the investigation requested by Colton and found that electrical energy generated outside the State of California was transmitted and delivered by Edison to Colton and thereby became a sale for resale in interstate commerce and subject to the jurisdiction of the FPC.

The City of Colton and the Staff of the Commission contend since the three power plants at Hoover, Parker and Davis dams are interconnected by a 220 kv line, owned by USBR, that energy generated at any one of the three power plants may be delivered by USBR to MWD and by MWD to Edison at Hayfield and that such electrical energy, being delivered into the Edison high voltage transmission system network [13] at Highgrove, from which substation Edison delivers electrical energy to its Colton substation and from there to the City of Colton substation, it is traceable to the City of Colton and therefore a sale for resale by Edison in interstate commerce and subject to the jurisdiction of the FPC.

Edison and PUC witnesses contend it is impossible to trace the out-of-state generated electrical energy to the City of

[11] Where it is metered. This electrical energy in 1958 amounted to 653,987,400 kwh, or 4% of Edison's total supply of electrical energy.

[12] The City of Colton purchased 23,120,000 kwh in 1958, or .15% of the total energy handled in the Edison system, some of this energy Colton used itself and the remainder was resold.

[13] "Network" is here used in its technical usage to denote "a system of transmission or distribution lines so cross-connected as to permit multiple supply to any point on it."

Colton but, assuming it could be traced, they argue the evidence shows the delivery to the City of Colton substation is made by Edison through its local distribution system and thereby exempt from the jurisdiction of the FPC by the terms of the Federal Power Act."[14]

This record shows that there are eight 12 kv lines running out from Edison's Colton distribution substation through distribution transformers thus dividing the electrical energy for delivery to thousands of domestic, residential and industrial customers in the City of Colton and its environs, the City of Colton being one of these customers. The City of Colton gets its total requirements of electrical energy from two of these eight 12 kv distribution lines as do certain other Edison customers who are end users of electrical energy. Edison and PUC each classify these eight 12 kv lines, which includes the two supplying the City of Colton and others, as "facilities used in local distribution" and by reason thereof exempt from FPC jurisdiction. In *Connecticut Light and Power Co.* v. *FPC*, 324 U.S. 515, 89 L. ed. 1150, the Supreme Court reviewed the intent of Congress in its declaration of policy in Section 201(a) of the Federal Power Act, also the Supreme Court reviewed the provisions of Section 201(b) which provide that the FPC shall have jurisdiction over all facilities for the transmission or wholesale of electrical energy in interstate commerce, "but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used * * * in local distribution" and held this "phrase to be a limitation on jurisdiction and a legal standard which must be given effect" in determining the jurisdiction of the FPC. The Court then went on to say "Nor do we think the exemption of 'facilities used in local distribution' exempts only those which do not carry any trace of out-of-state energy * * * They may carry no energy except extra-state energy and still be exempt under the Act. The test is whether they are local distribution facilities."

Colton and the Staff each contend that it is Colton's wholly-owned municipal electrical distribution system that are the "facilities used in local distribution." Section 201(d) of the Federal Power Act reads "the term 'sale of electric energy at wholesale' when used in this Part means a sale of electric energy to any person for resale." The FPC and the courts have been consistent in holding that local distribution

[14] Federal Power Act, Part II, Section 201(b).

does not commence until the electrical energy is in the possession of the party who receives it for resale.[15]

Motions to dismiss Colton's petition were filed and argued prior to the commencement of the hearing by Edison and by the PUC. Edison and the PUC allege, in their motions to dismiss, the FPC is without jurisdiction to regulate the sales of electrical energy by Edison to Colton. The Examiner took the motions under advisement to be ruled on in his initial decision.[16]

Since the courts have not construed the provisions of the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act relative to the jurisdiction of the Secretary of the Interior, or the Federal Power Commission, over the sales of electrical energy generated at Hoover-Davis-Parker power plant, it is necessary to ascertain the intent of the Congress when it enacted the legislation.

Congress, in the Act, directed the Secretary of the Interior to provide sufficient firm revenue from the sale of electrical energy to states, municipalities and others, to make the cost of the dam, and the fully equipped power plant, self-liquidating with interest within 50 years. It was the intent of Congress and the Secretary of the Interior [17] in negotiating firm take-or-pay contracts with Edison and MWD, among others, to effect as wide distribution of the generated energy as was possible. Thus the Congress knew the energy would be transmitted across state lines by the purchasers.

In the Act the Secretary of the Interior was authorized to and did enter into leases with Edison, MWD and others for the operation of the generators assigned to them at the power plants, and they thereby became agents [18] of the United States for the operation of their specific generators. As such agents of the United States they, as well as the Secretary of the Interior, come under the provisions of Section 201(f), Part II of the Federal Power Act.

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[15] *Wisconsin Michigan Power Co.* (1951) 10 FPC 170, affirmed 197 F. 2nd 472, cert. denied 345 U.S. 934; *Interstate Light & Power Co.* (1951) 10 FPC 225; *State of Wisconsin et al.* v. *FPC* (1952) 201 F. 2nd 183, cert. denied 345 U.S. 934.

[16] FPC Rules of Practice and Procedure 1.12(d).

[17] 4 Congressional Record, Vol. 72, Part II, 71st Congress, 2nd Congress, page 11,978 *et seq.*, letter from the Secretary of the Interior, dated June 17, 1930, to the Chairman, Committee on Appropriations (Senate) reporting on the firm take-or-pay contracts entered into by him with Edison, MWD, and others.

[18] 43 U.S.C.A. 618h.

This record distinctly shows that Edison by contract with MWD, which contracts were approved by the USBR, assumed the obligations of MWD to take or pay for certain of MWD's allotted electrical generating capacity at the Hoover Dam power plant. Also by a sale and/or exchange agreement between MWD and Edison, Edison further agreed to take and pay the United States for any unused electrical energy not then required by MWD at its Hayfield substation. Under each of these agreements, Edison makes an accounting to the United States for all such energy received by Edison from, or for the account of, MWD and makes a remittance therefore direct to the United States.

The Congress by Act of May 29, 1954, c. 241, 68 stat. 43 provided "For the purposes of effecting economies and increased efficiency in the * * * operation, and maintenance thereof and of accounting for the return of reimbursable costs, the Secretary of the Interior is authorized and directed to consolidate and administer as a single project * * * the Parker Dam power project * * * and the Davis Dam project: Provided, that nothing in this Act shall be construed to alter or affect in any way the Boulder Canyon Project Act (45 Stat. 1057) * * * the Boulder Canyon Project Adjustment Act (54 Stat. 774) * * *"

The attention of the Committee on Irrigation, holding hearings on the Boulder Canyon bill during the 1st Session, 69th Congress, was called to the objections of the FPC to Congress conferring jurisdiction on the Secretary of the Interior. The FPC urged the terms of the bill be amended so as to confer jurisdiction on it.

After considering the evidence before it, the Senate Committee on Irrigation amended the bill by adding Section 6[19] to its provisions directing "the Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, * * * and penalties for enforcing regulations made * * * or penalizing failure to comply with such regulations * * * He shall also conform with

[19] U.S.C.A. 617e, par. 2.

other provisions of Sections 791–825r of Title 16 [20] and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer." As thus amended the bill was favorably reported out of Committee.

Minority reports [21] were filed pointing out the departure from Government policy in not conferring jurisdiction on the FPC.

The sale of the electrical energy so generated to cities and towns—as in the case of the City of Colton—and the jurisdiction over the rates therefor was fully debated and clearly understood when the bill was under consideration on the floor of the Senate.[22]

The Boulder Canyon Project Act was enacted by the Congress with full intent of conferring jurisdiction on the Secretary of the Interior over the rates at which the energy was to be sold at the power plant and, in the absence of regulation by the State in which the energy was sold, over the rates to be charged the distributors.

This record fully discloses the Secretary of the Interior is now, and has been at all times, maintaining full jurisdiction over the rates charged for electrical energy generated at the Hoover, Davis and Parker Dam power plants to Edison and MWD, among others, and over the unused allotment of MWD electrical energy sold to Edison by MWD whether said energy be received by Edison at the Hoover Dam power plant or at the connection of the MWD line with Edison's line at Hayfield.

The evidence of record herein fully discloses the sales of electrical energy by Edison to Colton, for its own use or for resale, have at all times been regulated by the PUC.

Under the express provisions of the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act, the sales of electrical energy generated at Hoover, Davis and Parker Dem power plants to Edison and MWD by the Secretary of the Interior were intended to be and are herein determined to be under the jurisdiction of the Secretary of the Interior and by the terms of the Act itself were never intended by the Congress to be under the jurisdiction of the FPC. The sale of such energy by Edison to Colton for its own use or for

[20] Federal Power Act, U.S.C.A., 791 *et seq.*
[21] House Report No. 1657, 69th Congress, 2nd Session.
[22] Congressional Record, 2nd Session, 69th Congress, p. 4307 *et seq.*

resale also comes under the jurisdiction of the Secretary of the Interior in the absence of regulation by the PUC.

Wherefore the motions to dismiss are sustained and the petition of the City of Colton is dismissed for want of jurisdiction by the Federal Power Commission.

HARRY W. FRAZEE,
*Presiding Examiner.*

[CLERK'S NOTE: Exhibit "B" to petition to review, etc.—"Opinion of the Federal Power Commission, No. 346 and order determining jurisdiction in Docket No. E–6821 issued July 31, 1961" is omitted from the record here as it appears in the Joint Appendix, Volume II at pages 837–868.]

[CLERK'S NOTE: Errata Notice is omitted from the record here as it appears in the Joint Appendix, Volume II at page 869.]

[CLERK'S NOTE: Exhibit "C" to petition to review, etc.—"Order of the Federal Power Commission denying rehearing and granting stay in Docket No. E–6821, issued September 14, 1961" is omitted from the record here as it appears in the Joint Appendix, Volume II at pages 892–897.]

[*Exhibit D to petition to review, etc.*]

In the Superior Court of the State of California
in and for the County of San Bernardino

No. 167169

SOUTHERN CALIFORNIA EDISON COMPANY, PLAINTIFF

*vs.*

CITY OF COLTON, CALIFORNIA, DEFENDANT

Rollin E. Woodbury, John R. Bury, 601 West Fifth Street, Los Angeles 53, California, MAdison 4–7111; Graham, James & Rolph, 310 Sansome Street, San Francisco 4, California, YUkon 6–2171; attorneys for plaintiff.

COMPLAINT FOR RESCISSION AND RESTITUTION, FOR DECLARATORY RELIEF, AND FOR REFORMATION

For causes of action, plaintiff alleges as follows:

*First count*

I.

At all times herein mentioned, plaintiff was and now is a corporation duly organized and existing under and by virtue of the laws of the State of California, and authorized to do business in California.

II.

At all times herein mentioned, the defendant, City of Colton, was and now is, a municipal corporation organized and existing under and by virtue of the laws of the State of California.

III.

On or about October 1, 1945, plaintiff and defendant entered into a written agreement, a copy of which is attached hereto, marked Exhibit "A", and by this reference made a part hereof. Said agreement was made in the County of San Bernardino, State of California. Pursuant to the terms of this agreement, plaintiff agreed to furnish to defendant and defendant agreed to purchase from plaintiff for a period of ten (10) years from that date all of defendant's electric energy requirements, the bases for the charges for such energy being set forth in said contract. It was provided in said contract, among other things, that such charges were subject to such changes or modifications as the Railroad Commission (now Public Utilities Commission) of the State of California might from time to time direct in the exercise of its jurisdiction. It was further provided in said contract that upon expiration of the ten (10) year period, the contract would continue from month-to-month until terminated by either party upon written notice. It was further provided that the contract was to be filed with said Commission and that the rules and regulations of plaintiff on file from time to time with that Commission were to be controlling so far as applicable to the subject matter of the contract.

IV.

Pursuant to such agreement, plaintiff, Southern California Edison Company, has continuously since October 1, 1945, furnished, and defendant, City of Colton, has accepted all of the electric energy requirements of said City, and neither

party, prior to the filing of this complaint, has at any time taken action to terminate said agreement.

V

Pursuant to said agreement and the terms thereof, plaintiff, on two instances, specifically, December 16, 1952, and December 5, 1956, requested of the California Public Utilities Commission permission to increase the rates which it was then charging the City of Colton for said electric energy. In each instance, the Public Utilities Commission authorized certain increases, the first by Decision No. 50449 (making such increase effective on September 13, 1954), and the second by Decision No. 55703 (making such increase effective on November 9, 1957). Defendant, City of Colton, continued after each such increase to take all of its electric energy requirements from plaintiff and did not terminate the contract.

VI.

At all times herein mentioned the Public Utilities Commission of the State of California has exercised regulatory jurisdiction over plaintiff's sales of electric energy to defendant.

VII.

In entering into the agreement aforesaid, both parties acted in good faith and assumed that jurisdiction over said agreement, including the fixing of rates to be charged from time to time thereunder, was vested in the California Public Utilities Commission, and both parties, relying on the validity of such jurisdiction, agreed that said Commission would determine and regulate any changes or modifications in charges for the electric energy hereinabove referred to.

VIII.

The assumption by both plaintiff and defendant that the California Public Utilities Commission has at all times had jurisdiction over the aforesaid contract was, and at all times has been, a material feature of said contract without which plaintiff would not have entered into said contract.

IX.

On or about July 31, 1961, the Federal Power Commission issued its order in Docket No. E-6821 reversing the Decision of the Presiding Examiner issued March 14, 1961, and holding that the plaintiff's sales of electric energy to defendant for resale pursuant to the terms of the contract hereinabove referred to have been, since July 1, 1954, and continue to be, sales of electric energy at wholesale in interstate commerce subject to the exclusive jurisdiction of the Federal Power Commission.

X.

Unless said order of the Federal Power Commission is abrogated, whether by said Commission itself or by a court of last resort, a material mistake of fact and law will have been established, both parties having supposed that they knew and understood the law and both having made the same mistake, to wit, that the California Public Utilities Commission had, and at all times has had, jurisdiction to authorize the contract and that the rate levels authorized by said California Commission thereunder would be controlling. Until said order of the Federal Power Commission issued July 31, 1961, no holding had been made by any court or administrative body to the effect that the aforesaid contract and the rates charged by plaintiff for the electric energy service furnished to defendant thereunder fell under the exclusive jurisdiction of the Federal Power Commission.

XI.

Defendant, City of Colton, now claims that it is entitled to recover from plaintiff any sums collected pursuant to the rate increases ordered to be applicable to said contract of October 1, 1945, by the California Public Utilities Commission as aforesaid. If plaintiff is not entitled to retain sums collected pursuant to said rate increases ordered by the California Public Utilities Commission plaintiff will be deprived of a material part of the consideration due it under said contract.

XII.

Plaintiff has served upon defendant notice of plaintiff's intent to seek rescission of said contract in the event said order of the

Federal Power Commission is not abrogated by said Commission itself or by a court of last resort.

XIII.

Plaintiff asks that this Court determine that the aforesaid contract is rescinded if said order of the Federal Power Commission is not abrogated by said Commission itself or by a court of last resort after due diligence on the part of plaintiff to achieve that result. Plaintiff alleges that defendant cannot restore to plaintiff the electric energy service heretofore sold by plaintiff to defendant. Therefore, plaintiff asks that if rescission be ordered as herein requested, defendant be required to pay plaintiff the reasonable value of that electric energy service which plaintiff has supplied to defendant from and after October 1, 1945, to date; plaintiff is willing that in determining the amount to be paid by defendant upon the basis of the reasonable value of the electric service as aforesaid all monies which have been received by it for the sale of such electric energy service to defendant be allowed to defendant as a set-off in that amount against the reasonable value of the electric energy service furnished by plaintiff to defendant since the date provided for such service in the contract hereinabove referred to.

*Second count*

I.

Plaintiff refers to all the allegations contained in paragraphs I, II, III, IV, V, VI, VII VIII and XI of the first cause of action herein, and by reference incorporates the same as though fully set forth.

II.

An actual controversy has arisen between the parties hereto in relation to the aforesaid contract and their respective legal rights and duties thereunder. Plaintiff states that, irrespective of any ultimate determination of the scope of the jurisdiction of the California Public Utilities Commission under the applicable regulatory statutes, under said contract properly interpreted the parties agreed that the level of rates to be applied under said contract were to be as changed or fixed from time to time by said California Commission. Defendant now claims that it is entitled under said contract to recover any amounts

charged or collected by plaintiff which represent increases in charges determined by said California Commission to be fair and reasonable.

III.

A declaration of the rights and duties of the parties under said agreement is required, including a determination of the aforesaid question of construction, so that plaintiff may take appropriate and timely action and avoid taking any steps which might prejudice its rights and interests.

*Third count*

I.

Plaintiff refers to all the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the first cause of action herein, and by such reference incorporates the same herein as though fully set forth.

II.

Prior to the time that said contract as hereinabove referred to was reduced to writing, both the plaintiff and defendant assumed that said California Commission had jurisdiction over the subject matter of said contract and orally agreed that said California Commission would determine whether any changes or modifications would be made to the charges for the sale of electric energy from plaintiff to defendant so that such charges would at all times be just and reasonable, and such agreement was not contingent upon the California Commission having jurisdiction over such changes or modifications.

III.

The agreement as reduced to writing as hereinabove referred to did not specifically state the intent of the parties as set forth in paragraph II of this cause of action but should have in order to conform with the intent of the parties. Said written agreement should have provided that, irrespective of any ultimate determination of the scope of the jurisdiction of the California Public Utilities Commission under the applicable regulatory statutes, the level of rates to be applied under said contract were to be as changed or fixed from time to time by said California Commission.

IV.

Subsequent to the execution of the aforementioned contract, both plaintiff and defendant complied therewith in good faith, and plaintiff charged and collected thereunder the rates determined from time to time by the California Public Utilities Commission to be fair and reasonable.

V.

Plaintiff had no reason to seek reformation of the contract aforementioned until the issuance by the Federal Power Commission of its Opinion No. 346 referred to hereinabove.

Wherefore, plaintiff prays for judgment against defendant as follows:

1. Adjudging said written agreement with defendant, City of Colton, rescinded in the event Federal Power Commission jurisdiction over the rates charged and collected for said electric energy is ultimately found to exist (first count);

2. Making an award in such amount as is the reasonable value of electric energy which plaintiff has supplied to defendant from and after October 1, 1945, subject to a right of set-off by defendant for any amounts paid by it respecting such service (first count);

3. Declaring that the said written agreement must be construed to mean that the parties agreed that, irrespective of any ultimate determination of the legal right of the California Public Utilities Commission to exercise jurisdiction, the level of rates agreed upon between the parties would be as changed or fixed from time to time by said Commission in the exercise of its presumed jurisdiction (second count);

4. Revising said written agreement to conform with the oral agreement set forth in paragraph II of the third cause of action (third count);

5. For plaintiff's costs of suit incurred herein;

6. For such other and further relief as to the Court seems just and proper.

Dated:

/s/ JOHN R. BURY,
*Attorney for Plaintiff.*

STATE OF CALIFORNIA,
*County of Los Angeles, ss:*

I, the undersigned, say: I am the Vice President and Senior Counsel of Southern California Edison Company, Plaintiff in the above entitled action; I have read the foregoing Complaint for Rescission and Restitution, for Declaratory Relief, and for Reformation and know the contents thereof; and that the same is true of my own knowledge, except as to the matters which are therein stated upon my information or belief, and as to those matters that I believe it to be true.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on August 28, 1961, at Los Angeles, California.

/s/ Bruce Renwick
BRUCE RENWICK.

[CLERK'S NOTE: Exhibit "A" to Exhibit "D"—"Agreement, dated October 1, 1945, between City of Colton and Southern California Edison Company, Ltd." is omitted from the record here as it appears in the Joint Appendix, Volume II, at pages 717–723]

[File endorsement omitted]

In the United States Court of Appeals for the Ninth Circuit

No. 17608

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

*Petition to review and set aside orders of the Federal Power Commission—filed November 7, 1961*

*To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:*

Comes now petitioner, the Public Utilities Commission of the State of California (California), being aggrieved by the Federal Power Commission's (FPC) Opinion and Order Determining Jurisdiction (Opinion No. 346) issued July 31, 1961, and by FPC's Order Denying Rehearing and Granting Stay (issued September 14, 1961), in FPC proceeding entitled *City of Colton, California* v. *Southern California Edison Company,*

Docket No. E–6821, respectfully petitions this Honorable Court to review and set aside said orders.

## JURISDICTION AND VENUE

This petition is filed under pursuant to the provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. 825 *l*(b) which provides in part as follows:

"Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located, or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. • • •"

The attorney for the Public Utilities Commission of the State of California is empowered to "represent and appear for the people of the State of California and for the commission" in a proceeding such as is now before this Court. (California Public Utilities Code § 307.) Through said attorney, California intervened in the aforementioned complaint proceeding before FPC and became a party to said proceeding.

Southern California Edison Company (Edison) is an electrical corporation as defined by Section 218 of the California Public Utilities Code and a public utility as defined by Section 216 thereof. It is a California corporation, is located in and has its principal place of business in the State of California. Inasmuch as the orders of FPC of which California seeks to obtain review relate to Edison, this Court has jurisdiction under Section 313(b) of the Federal Power Act, *supra*.

## STATEMENT OF PROCEEDING

California has jurisdiction over the intrastate rates of all public utilities in the State of California, including Edison. (Constitution of the State of California, Article XII, sec. 23; sections 216 and 532, California Public Utilities Code.) California also has jurisdiction over facilities used by all electric utilities, including Edison, for local distribution in California of energy moving in interstate commerce. (Section 201(a)(b) Federal Power Act, 16 USC 824.)

California has exercised and continues to exercise jurisdiction over rates charged by Edison for sale of electric energy to California cities, including the City of Colton (Colton), for resale.

Edison and Colton entered into a contract dated October 1, 1945, whereby Edison agreed to sell and Colton agreed to buy electric energy for municipal purposes and for resale, at stated rates. The parties expressly agreed that the rates and contract were subject to the jurisdiction of California. In 1954 and again in 1957 California authorized increases in rates for Edison's sales for resale to California cities, including Colton. Colton appeared generally and participated in the rate proceedings.

Edison thereafter charged and Colton paid the rates so authorized by California. Such rates are and have been the just, reasonable and non-discriminatory rates for such service.

On May 9, 1958 Colton filed a petition with FPC requesting it to institute an investigation and to direct Edison to file a rate schedule pursuant to the 1945 contract with Colton, to cease charging rates other than those specified in the 1945 contract and to make refunds of the difference between the 1945 contract rates and the increased rates authorized by California as aforesaid.

Colton alleged on information and belief that Edison sells it energy generated outside of the State of California and delivers such energy to Colton by means of transmission facilities. Motions to dismiss were filed by Edison and California, but pursuant to FPC's order, hearings were held on Colton's complaint. FPC did not institute an investigation as sought by Colton, but its staff participated in the proceeding.

On March 14, 1961, FPC's Presiding Examiner issued his decision granting Edison's and California's motions to dismiss for want of FPC jurisdiction of Edison's sale of electric energy to Colton for resale. (Exhibit A attached to Edison's Petition to Review and Set Aside an Order of the Federal Power Commission, heretofore filed in this Court, No. 17608.)

On July 31, 1961, FPC issued its Opinion No. 346, Opinion and Order Determining Jurisdiction, reversing the decision of its Presiding Examiner, asserting that it had jurisdiction of Edison's sales of energy to Colton for resale and denying the motions of California and Edison to dismiss Colton's complaint. The opinion granted Colton substantially all it sought in its complaint. (Exhibit B attached to Edison's said Petition to

Review and Set Aside an Order of the Federal Power Commission.)

Petitions for rehearing and for a stay order were filed by Edison and by California, and on September 14, 1961, FPC denied rehearing, and granted a stay which has since expired. Request for a further stay pending court review was denied.

SPECIFICATION OF ERRORS

California respectfully submits that FPC, by its Opinion and Order Determining Jurisdiction (Opinion No. 346) issued July 31, 1961 and by its Order Denying Rehearing and Granting Stay, issued September 14, 1961, erred in each and all of the following respects:

1. In finding that "The record shows that it [energy generated at Hoover Dam] is transmitted from this point [Edison's Highgrove substation] through the step-down transformers mentioned above and is delivered to Colton for resale. * * *" (Opinion p. 9) and in finding that "Edison delivered electric energy to Colton for resale that has been generated outside of California." (Opinion p. 10.) The record does not show this by reliable, probative and substantial evidence, and the finding has no support in the record. Without such evidence, FPC assertion of jurisdiction is error (Title 5 USCA 1006(c)) and its jurisdiction is precluded (Federal Power Act, Sections 201(a), 201(b)).

2. In finding that the facilities by which Edison serves Colton are not facilities used in local distribution. There is not a word in the record to support such a conclusion, and the record supports only a finding that the facilities which serve Colton are facilities used solely in local distribution and exempt from the jurisdiction of FPC (Sec. 201(b) of the Federal Power Act.)

3. In finding that the local distribution characteristics of the facilities which serve Colton are not relevant under the Federal Power Act and that the sale to Colton "is a sale at wholesale in interstate commerce subject to our jurisdiction regardless of the nature of the facilities used to make the sale" (Opinion p. 10) in violation of Sec. 201(b) of the Federal Power Act.

4. In finding that the "bulk sale of energy here . . . concerns more than one state" (Opinion p. 8). There is not a

word in the record to support this finding, and the fact is that no state other than California is concerned with Edison's sale to Colton for resale.

5. In finding that the Boulder Canyon Project Act (45 Stat. 1057) and Boulder Canyon Project Adjustment Act (54 Stat. 774) do not confer upon the Secretary of the Interior jurisdiction to control rates and service in the absence of State regulation for resale of electrical energy from Hoover Dam, and in finding that such jurisdiction was vested in FPC.

6. In placing any reliance upon deliveries of interstate energy from Davis Power Plant to Edison for its assertion of jurisdiction of resale rates to Colton, since such deliveries, if they did occur, were small, infrequent and have not occurred since April 30, 1956.

7. In finding that it had no discretion to reject jurisdiction over trivial resales of interstate energy, assuming that there was such energy in Edison's sales to Colton.

8. In refusing to reopen the proceeding to consider a change of a permanent nature in the circumstances upon which its decision is apparently based, as follows: the opinion purports, in the absence of any substantial, reliable or probative evidence, to "trace" energy generated at Hoover Dam to a connection which is one of those supplying energy to Colton. Due to operational changes, no energy from Hoover has been received by Edison over this connection since February 1961, and, barring disaster or emergency, it is not anticipated that any energy from Hoover will be available to be delivered to Edison over this connection in the future. FPC stated in its order denying rehearing: "The changed circumstances can properly be brought before us in another proceeding." Inasmuch as Opinion No. 346 concerns Edison's rates for the future as well as for a past period, it was an abuse of discretion for FPC to have denied reopening as its jurisdiction of such rates for the future is now moot.

9. In ordering Edison to account for monies collected from Colton after July 1, 1954 in excess of rates charged on July 1, 1954, to establish a special reserve for the amount of such excess together with interest and to file with FPC a plan for disposing of such special reserve, thus attempting to adjudicate a claim for reparations and refund although Congress has not given FPC jurisdiction of such claims.

FPC by its above-mentioned opinions and orders has acted arbitrarily, capriciously, in excess of its jurisdiction, and in violation of the Fifth and Tenth Amendments of the Constitution of the United States, of Sections 201 (a) and (b) of the Federal Power Act, the Boulder Canyon Project Act and the Boulder Canyon Project Adjustment Act. Unless its opinions and orders are reviewed and found to be unlawful, California and the people of the State of California will be denied due process of law; California will be ousted of the jurisdiction which is reserved to it by the terms of the Federal Power Act and the Boulder Canyon Project Acts; and California and Edison's ratepayers, whom California represents, other than Colton will be unduly prejudiced and Colton unduly preferred.

Wherefore, California respectfully prays:

1. That a certified copy of this petition be forthwith served upon a member of respondent, the Federal Power Commission.

2. That FPC's order of July 31, 1961, and its order of September 14, 1961, be reviewed and if found unlawful set aside, and that an order be entered remanding the proceeding to respondent, Federal Power Commission, with directions to vacate its opinions and orders and to take whatever action is required to correct the errors specified herein.

3. For such other and further relief as may be proper in the premises.

Respectfully submitted,

WILLIAM M. BENNETT,
*Chief Counsel,*
RODERICK B. CASSIDY,
*Assistant Chief Counsel,*
MARY MORAN PAJALICH,
*Principal Counsel,*
*State Building, San Francisco 2, California, Attorneys for the Public Utilities Commission of the State of California, Petitioner.*

Dated at San Francisco, California, November 1961.

[Certificate of Service omitted in printing]

In the United States Court of Appeals for the Ninth Circuit

Present: Honorable FREDERICK G. HAMLEY, Presiding; Honorable CHARLES M. MERRILL; Honorable JAMES R. BROWNING; U.S. Circuit Judges.

No. 17608

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

*vs.*

FEDERAL POWER COMMISSION

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SOUTHERN CALIFORNIA EDISON COMPANY

*vs.*

FEDERAL POWER COMMISSION

*Order granting motion for leave to intervene—November 27, 1961*

The motion of the City of Colton, California for leave to intervene in the above entitled matters, and the statements by respondent and petitioners showing no opposition thereto, coming on this day for hearing with no appearances being made in open court on behalf of any party, the motion was duly submitted. Upon consideration thereof,

*It is ordered*, That the motion of the City of Colton, California for leave to intervene be and the same hereby is granted.

11/29 M.

cc: Graham, Everett, Cragum, Goldner, Bennett.

In the United States Court of Appeals for the Ninth Circuit

No. 17608

SOUTHERN CALIFORNIA EDISON COMPANY, AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS

*v.*

FEDERAL POWER COMMISSION, RESPONDENT

*Certificate of record in lieu of record—filed December 12, 1961*

Pursuant to the provisions of Section 19(b) of the Natural Gas Act (15 U.S.C. § 717r(b)) and Paragraph 7(a) of Rule 34 of this Court, the Federal Power Commission hereby certifies that the material listed and described below* constitutes (1) the complete record upon which the Commission's orders, issued July 31, 1961 (Opinion No. 346) and September 14, 1961, complained of in the petitions in the above-entitled proceeding before the Commission entitled *City of Colton, California* v. *Southern California Edison Co., Operator*, Docket No. E–6821, and (2) the application for rehearing of the order of July 31, 1961 together with the Commission action thereon.

*Whenever there is more than one copy of a document in the record it is paginated only once. An asterisk (*) after a Certified Transcript Pagination indicates such a duplication.

[File endorsement omitted]

| Description of Document | Original pagination | Cert. tr. pagination. |
|---|---|---|
| Transcript of hearing held December 8, 1959, *City of Colton, California* (Colton) v. *Southern California Edison Co.*, Operator (Edison), E–6821 | Page 1 | 1 |
| | Page 120 | 120 |
| Transcript of hearing held December 9, 1959, E–6821 | Page 251 | 251 |
| Transcript of hearing held December 10, 1959, E–6821 | Page 371 | 371 |
| Transcript of hearing held May 3, 1960, E–6821 | Page 418 | 418 |
| Transcript of hearing held May 4, 1960, E–6821 | Page 536 | 536 |
| Transcript of hearing held May 5, 1960, E–6821 | Page 633 | 633 |
| Transcript of ehearing held May 6, 1960, E–6821 | Page 766 | 766 |
| Transcript of hearing held May 9, 1960, E–6821 | Page 766 | 766 |
| Transcript of hearing held May 10, 1960, E–6821 | Page 903 | 903 |
| Errata Transcript filed June 14, 1960, E–6821 | Page 932 | 932 |

**All of the exhibits described below were received in evidence, except for Exhibits 24 and 25, which were rejected by the ruling of the Presiding Examiner.**

| Exhibit Nos. | Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|---|
| 1 | Map showing the relative geographic locations of Hoover Dam, Davis Dam, & Parker Dam power plants, & of the Hayfield, Highgrove & Colton substations and the intervening transmission lines. | | 961 |
| 2 | A one-line diagram | | 962 |
| 3 | Tabulation entitled, "Power Cover Flow Data," prepared by the Bureau of Power, F.P.C. | | 963 |
| 4 | Tabulation entitled, "Sales at Wholesale of Electric Energy to the City of Colton by Southern California Edison Company." | Page 1 | 964<br>1069 |
| 5 | Agreement, dated October 1, 1945, between City of Colton and Southern California Edison Company, Ltd. | Page 1<br>Page 2 | 1069-A<br>1070 |
| 6 | Compilation by months and years for 1954 through October, 1960, showing billing periods, purchases, actual charges, amounts chargeable under the October 1, 1945 contract, and excess charges imposed by Edison upon Colton. | Page 1 | 1075 |
| 7 | City Warrant of the City of Colton, California, of the stubs of five bills of the Southern California Edison Co. | | 1084 |
| 8 | Certificate of qualification of foreign corp., issued by the Dept. of State of the State of Nevada to Southern California Edison Co. | | 1085 |
| 9 | Certified copy of documents of Southern California Edison Co., filed in the Office of the Arizona Corp. Commission on May 23, 1931, showing its qualifications to do business in the State of Arizona. | Certification<br>Sheet 1 | 1086<br>1087 |
| 10 | One sheet entitled, "Adjustable Calculator Elements," containing photographs of equipment and electric facilities. | | 1104 |
| 11 | Cover page and seven sheets bearing title, "Southern California Edison Company, A. C. Network Calculator Studies of Portions of Edison, M.W.D., and U.S.B.R. Systems." | Cover<br>Sheet 1 | 1105<br>1106 |
| 12 | Map bearing the legend, "Electric Power Systems of California and their Interconnections, Southern California Edison Company, No. 9108." | | 1113 |
| 13 | Map entitled, "Southern California Edison Company, San Bernardino and Redlands Districts." | | 1114 |
| 14 | Edison, Exhibit I, Colorado River Contracts | Cover<br>Contents, Page i<br>Title Page<br>Page 1 | 1115<br>1116<br>1123<br>1124 |
| 15 | Three-page letter, dated December 1, 1959, on letterhead of the M.W.D of Southern California, to W. E. Montgomery, Vice President, Southern California Edison Co., from Robert B. Diemer, General Manager and Chief Engineer. | Page 1 | 1248 |
| 16 | Single sheet entitled, "Southern California Edison Company, 'Net Generation'; *i.e.*, Kilowatt-Hours Transmitted Years 1954 through 1958". | | 1251 |
| 17 | Letter dated November 20, 1959, from Nevada Public Service Commission to Southern California Edison Co., consisting of two pages signed, Public Service Commission of Nevada—J. G. Allard, Chairman. | Page 1 | 1252 |
| 18 | Letter dated November 24, 1959, from Arizona Corp. Commission to Southern California Edison Co., consisting on one page, signed by Arizona Corp. Commission—S. C. Corbitt, Director, Utilities Division. | | 1254 |
| 19 | Document captioned—Before the Railroad Commission of the State of California, in the Matter of the application of Southern California Edison Company, etc., Application No. 27108. | Page 1 | 1255 |
| 20 | Document captioned—Decision No. 28461, before the RR Commission of the State of California in the matter of Southern California Edison Co., etc., Application No. 27108. | Page 1 | 1260 |

| Exhibit Nos. | Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|---|
| 21 | Document bound in green cover, captioned, "Southern California Edison Company, Decision No. 56449 (August 17, 1954) before the Public Utilities Commission of the State of California." | Cover | 1382 |
| | | Index, Sheet 1 | 1383 |
| | | Page 1 | 1385 |
| | | Appendix A, Page 1 | 1352 |
| | | Appendix B, Page 1 | 1396 |
| | | Appendix C, Page 1 | 1399 |
| | | Appendix D, Page 1 | 1401 |
| 22 | Document captioned "Southern California Edison Company, Decision No. 56708 (October 15, 1957) before the Public Utilities Commission of the State of California." | Cover | 1403 |
| | | Title Page | 1404 |
| | | Page 1 | 1405 |
| | | Appendix A, Page 1 | 1457 |
| | | Appendix B, Page 1 | 1470 |
| 23 | Sales and Revenue Data Comparison of Edison Records and Reports with City of Colton Reports, 1954-1956. | Title Page | 1472 |
| | | Page 1 | 1473 |
| 24 | Document captioned: "Copy Before the Public Utilities Commission of the State of California, in the Matter of the Application of Southern California Edison Company, etc., Application No. 33962. Reporter's Statement, under date of May 3, 1954, consisting of cover page and two pages, the second of which is headed, "Excerpts from oral argument of John W. Holmes, counsel for the City of Colton, and others", commencing at 7024. | (Rejected—Offer of Proof Made.) | |
| | | Title Page | 1485 |
| | | Sheet 1 | 1486 |
| 25 | Document bearing notation in upper-hand corner, "Application No. 33962, Exhibit No. 53, Witness C. A. Wilder, date, June 13, 1957, prepared on behalf of the City of Colton, California and Others, and received in evidence at Edison's second rate proceeding before the California Commission in 1957. | (Rejected—Offer of Proof Made.) | |
| | | Title Page | 1488 |
| | | Page 1 | 1489 |
| | | Appendix A, Page 1 | 1520 |
| 26 | Map of Southern California Edison Co., 220 kv Transmission System and Major Production Facilities serving San Bernardino Area. | | 1531 |
| 27 | Schematic Diagram of Southern California Edison Co., 66 kv Transmission System & Substations Pertinent to Serving Colton Area. | | 1532 |
| 28 | Diagram entitled, "Colton Switching Center, 12 kv lines." | | 1533 |
| 29 | Southern California Edison Co. Energy Source Chart as Related to Serving City of Colton, Year 1958. | | 1534 |
| 30 | Tabulation and Brief Summary of references to California Public Utility Commission regulation of Southern California Edison Company's sales of electricity to City of Colton. | Title Page | 1535 |
| | | Page 1 | 1536 |
| 31 | Loads 1 and 2—L-1 and L-2 and two sources S-1 and S-2. | | 1539 |
| 32 | Blank diagram | | 1540 |
| 33 | Diagram | | 1541 |
| 34 | Diagram A, Docket No. E-6821 | | 1542 |
| 35 | Diagram B | | 1543 |
| 36 | Diagram C | | 1544 |
| 37 | Diagram D | | 1545 |
| 38 | Diagram G | | 1546 |
| 39 | Diagram H | | 1547 |
| 40 | Photographs of certain facilities of Southern California Edison Co. related to service in and around the City of Colton. | Cover | 1548 |
| | | Picture No. 1 thru 20 | 1549 |
| | | Description | 1569 |
| 41 | Diagram | | 1570 |

The following items were offered and received in evidence by reference to the files of the Commission.

| Item | Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|---|
| A | Single-line diagram bearing No. 71036-3, and which appears in the power system statement, Form 12, filed by Edison for the year 1957. | | 1571 |
| B | Diagram bearing the legend, "Colton Switching Center, 11 kv lines," which appears in the same power system statement three pages following the single-line diagram marked as Item A. | | 1572 |

| Item | Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|---|
| C | Extracts from FPC Form 1—Annual Report of Southern California Edison Co. to the FPC, for the year ending December 31, 1958, pages 23, 39A, 39B, 69A, 76, 78, 79A, 84 and a map, contained at last page of report, bearing No. 9117 and entitled Southern California Edison Co., Map of Transmission System. | Pages 23, 39A, 39B, 39B-1, 69A, 76, 78, 79A, 84.<br>Map | 1573<br>1582 |
| D | Extracts from FPC Form 1—Annual Report of Southern California Edison Co. to FPC for the year ending December 31, 1957, pages 25, 43A, 43B, 75, 82, 85A, 90. | Pages 25, 43A, 43B, 75, 82, 84, 85A, 90. | 1583 |
| E | Extracts from FPC Form 1—Annual Report of Southern California Edison Co. to FPC for the year ending December 31, 1956, pages 25, 55, 75A, 82, 84, 85A, 90 and a map, following page 110, bearing No. 9117 and entitled "Southern California Edison Co., Map of Transmission System." | Pages 25, 55, 75A, 82, 84, 85A, 90.<br>Map | 1591<br>1598 |
| F | Extracts from FPC Form1 —Annual Report of Southern California Edison Co. to FPC for the year ending December 31, 1955, pages 25, 43, 44, 75A, 82, 84, 85A, 90 and a map, contained at last page of report, bearing No. 9117 and entitled "Southern California Edison Company, Map of Transmission System." | Pages 25, 43, 44, 75A, 82, 84, 85A and 90.<br>Map | 1599<br>1607 |
| G | Extracts from FPC Form 1, annual report of Southern California Edison Co. to the FPC for the year ending December 31, 1954, pages 25, 55A, 75A, 82, 84, 85A, 90 and a map, contained at last page of report, bearing No. 9117 and entitled "Southern California Edison Co., Map of Transmission System." | Pages 25, 55A, 75A, 82, 84, 85A, 90.<br>Map | 1608<br>1615 |
| H | Single-line diagram appearing in Edison's Form 12, Power System Statement for the year 1958, being No. 71036-5. | | 1616 |
| I | Page 31 of Schedule 18B, appearing FPC Form No. 12 of the 1958 Power System Statement, filed by Edison. | | 1617 |
| J | Schedule 14 of the Power System Statement referred to in Item I. | | 1618 |
| K | Schedule 18B, page 31 of FPC Form No. 12, for 1957, Edison. | | 1619 |
| L | Schedule 14, page 22 of FPC Form No. 12, Edison, 1957. | | 1620 |
| M | U.S. Dept. of Interior, Bureau of Reclamation, Parker Dam Power Plant, Transmission Lines and Bus Data Miscellaneous, dated July 5, 1955. | Transmittal letter<br>Certification<br>Data | 1621<br>1622<br>1623 |
| N | Schedules 1, 17 and 18B, from FPC Form No. 12, Power System Statement, for the year 1958, filed with FPC by Edison. | Schedule 1: Pages 4, 4a, 5, 5a, 5b and 5c.<br>Schedule 17: Pages 28, 28a, 28b<br>Schedule 18B:<br>Page 30<br>Page 31<br>Page 31a to 31f | 1624<br>1630<br><br>1633<br>*1617<br>1634 |
| O | Schedule 18B from FPC Form No. 12, Power System Statement, for the year 1958, filed by Metropolitan Water District of Southern California. | | 1646 |
| P | Schedule 18B from FPC Form No. 12, Power System Statement for the year 1958, filed by the United States Dept. of Interior, Bureau of Reclamation, covering the Colorado River System Lower Basin. | Page 30 and 31 | 1647 |
| Q | Schedule 1, from Edison FPC Form No. 12, Power System Statement for the year 1945. | Page 4 and 5 | 1649 |
| R | Letter dated November 2, 1953, addressed to Bruce Renwick, Esq. signed by Leon M. Fuquay. | Page 1 | 1651 |
| S | Six letters in the Edison correspondence file, part one, dated August 31, 1953, September 4, 1953, September 17, 1953. Letter of November 2, 1953 previously identified as Item R, and a letter of February 17, 1954, and letter dated March 24, 1954, addressed to Mr. Leon M. Fuquay. | Letters dated:<br>August 31, 1953<br>September 4, 1953<br>September 17, 1953, Page 1.<br>November 2, 1953<br>February 17, 1954<br>March 24, 1954, Page 1. | <br>1653<br>1654<br>1655<br>1651-*1652<br>1657<br>1658 |

| Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|
| Colton, Petition for an Order, E-6821, received May 9, 1956. | Sheet 1 | 1674 |
| Letter of May 13, 1958 from FPC to Edison, enclosing copy of petition last above, etc., E-6821. | | 1680 |
| Letter of May 13, 1958 from FPC to Arizona Corp. Commission, requesting comments, etc. E-6821. | | 1681 |
| Letter of May 13, 1958 from FPC to California Public Utilities Commission, requesting comments, etc., E-6821. | | 1682 |
| Letter of May 13, 1958 from FPC to Nevada Public Service Commission, requesting comments, etc., E-6821. | | 1683 |
| Letter of May 20, 1958 from Public Utilities Commission of the State of California in response to FPC letter of May 13, 1958, E-6821, received May 26, 1958. | | 1684 |
| Answer of Southern California Edison Co., E-6821, received June 9, 1958. | Page 1 | 1685 |
| Order Fixing Hearing, *Colton* v. *Edison*, E-6821, issued August 28, 1959. | Page 1 | 1695 |
| Transmittal letter of October 20, 1959 from Colton to FPC enclosing copy of contract, etc., E-6821, received October 21, 1959. | Letter: Agreement between City of Colton and Southern California Edison Company, Ltd., dated October 1, 1945. | 1697 |
| | Page 1 | 1698 |
| Public Utilities Commission of the State of California, Notice of Intervention, E-6821, received October 26, 1959. | Page 1 | 1704 |
| | Certificate of Service | 1707 |
| Notice of Hearing, E-6821, issued October 29, 1959. | | 1708 |
| Edison, Motion to Dismiss, E-6821, received December 2, 1959. | Page 1 | 1709 |
| | Verification | 1729 |
| | Affidavit of R. P. O'Brien, Page 1 | 1730 |
| | Exhibit "A" | 1485-*1487 |
| | Exhibit "B", Sheet 1 | 1739 |
| | Exhibit "C", Sheet 1 | *1653 |
| | Sheet 2 | *1654 |
| | Sheet 3 and 4 | 1655-*1656 |
| | Sheet 5 and 6 | 1651-*1652 |
| | Sheet 7 | *1657 |
| | Sheet 8 | 1741 |
| | Sheet 9 thru 24 | 1658-*1673 |
| | Certificate of Service | 1742 |
| Designation of Presiding Examiner filed December 3, 1959, E-6821. | | 1743 |
| Public Utilities Commission of the State of California, Motion to Dismiss, E-6821, received December 7, 1959. | Page 1 | 1744 |
| | Certificate of Service | 1749 |
| Edison, Request for Continuance, E-6821, received December 30, 1959. | Page 1 | 1750 |
| Answer of Commission Staff to "Request for Continuance", E-6821, filed January 4, 1960. | Page 1 | 1756 |
| Response of Colton to Request for Continuance of Edison, E-6821, received January 4, 1960. | Certificate of Service | 1758 |
| Presiding Examiner's Notice of Continuance of Hearing, E-6821, issued January 7, 1960. | Page 1 | 1759 |
| Letter of March 9, 1960 from Public Service Commission of the State of Nevada to FPC stating interest in case, etc., E-6821, received March 14, 1960. | | 1763 |
| Letter of March 24, 1960 from Edison to FPC enclosing copy of letter dated March 10, 1960 from Arizona Corp. Commission, E-6821, received March 29, 1960. | | 1764 |
| | Transmittal letter | 1765 |
| | Enclosure | 1766 |
| Colton, Request for Continuance, E-6821, received March 28, 1960. | Page 1 | 1767 |
| Presiding Examiner's Notice of Further Continuance of Hearing, E-6821, issued April 1, 1960. | Certificate of Service | 1770 |
| Presiding Examiner's Notice of Further Continuance of Hearing, E-6821, issued April 15, 1960. | | 1771 |
| Staff Request for Extension of Time, E-6821, filed May 20, 1960. | | 1772 |
| Presiding Examiner's Notice of Extension of Time for Filing Transcript Corrections, E-6821, issued May 23, 1960. | | 1773 |
| | | 1774 |

| Description of document | Original pagination | Cert. tr. pagination |
|---|---|---|
| Staff Request for Extension of Time for Filing Briefs, E-6821, filed June 24, 1960. | | 1775 |
| Presiding Examiner's Notice of Extension of Time for Filing Briefs, E-6821, issued June 29, 1960. | | 1777 |
| Staff Request for Extension of Time for Filing Briefs, E-6821, filed July 27, 1960. | | 1778 |
| Presiding Examiner's Notice of Further Extension of Time for Filing Briefs, E-6821, issued July 29, 1960. | | 1780 |
| The Public Utilities Commission of the State of California, Motion for Extension of Time for Filing Briefs, E-6821, received August 15, 1960. | Title Page | 1781 |
| | Page 1 | 1782 |
| | Certificate of Service, Page 1 | 1784 |
| Presiding Examiner's Notice of Further Extension of Time for Filing Briefs, E-6821, issued August 29, 1960. | | 1786 |
| Staff Request for Extension of Time for Filing Reply Briefs, E-6821, filed September 27, 1960. | Request | 1787 |
| | Certificate of Service | 1788 |
| Presiding Examiner's Notice of Further Continuance of Time for the Filing of Reply Briefs, E-6821, issued September 29, 1960. | | 1789 |
| Decision, Upon Petition of The City of Colton Under The Federal Power Act, E-6821, issued March 14, 1961. | Page 1 | 1790 |
| Presiding Examiner's Certification of the Record Accompanying Initial Decision, E-6821, filed March 14, 1961. | Page 1 | 1800 |
| Staff Request for Extension of Time for Filing Exceptions, E-6821, filed March 28, 1961. | Request | 1807 |
| | Certificate of Service | 1808 |
| Notice of Extension of Time, E-6821, issued March 31, 1961. | | 1809 |
| Exceptions of the City of Colton, California, to Presiding Examiner's Decision issued March 14, 1961, E-6821, received May 2, 1961. | Cover | 1810 |
| | Title Page | 1811 |
| | Table of Contents, Page i | 1812 |
| | Page 1 | 1814 |
| Southern California Edison Co., Exceptions to Decision of Presiding Examiner Proposed Additional Findings and Conclusions, E-6821, received May 3, 1961. | Cover | 1840 |
| | Table of Contents | 1841 |
| | Page 1 | 1842 |
| | Certificate of Service | 1869 |
| Exceptions of the Public Utilities Commission of the State of California to the Presiding Examiner's Decision, E-6821, received May 3, 1961. | Title Page | 1870 |
| | Subject Index | 1871 |
| | Page 1 | 1872 |
| | Certificate of Service, Page 1 | 1882 |
| Exceptions of Commission Staff to Decision of Presiding Examiner issued March 14, 1961, E-6821, filed May 3, 1961. | Cover | 1884 |
| | Page 1 | 1885 |
| | Certificate of Service | 1916 |
| Opinion No. 346, Opinion and Order Determining Jurisdiction, E-6821, issued July 31, 1961. | Cover | 1917 |
| | Appearances | 1918 |
| | Page 1 | 1919 |
| | Errata Notice issued 8/16/61 | 1938 |
| Motion of Southern California Edison Co. for Stay and Extension of Time, E-6821, received August 21, 1961. | Page 1 | 1939 |
| | Certificate of Service | 1942 |
| Petition of Southern California Edison Co. for Rehearing, E-6821, received August 21, 1961. | Title Page | 1943 |
| | Table of Contents | 1944 |
| | Page 1 | 1945 |
| | Certificate of Service | 1965 |
| Petition of Public Utilities Commission for Rehearing and for Order Staying or, Extending Time, E-6821, received August 22, 1961. | Title Page | 1966 |
| | Page 1 | 1967 |
| | Verification | 1974 |
| | Certificate of Service, Page 1 | 1975 |
| Notice of Extension of Time, E-6821, issued September 7, 1961. | | 1977 |
| Order Denying Rehearing and Granting Stay, E-6821, issued September 14, 1961. | Page 1 | 1978-1981 |

By the Commission.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 8th day of December, 1961, at Washington, D.C.

J. H. GUTRIDE,
*Secretary.*

In the United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, MERRILL and BROWNING, *Circuit Judges.*

*Minute entry of argument and submission—June 15, 1962*

This cause coming on regularly for hearing or submission, Mr. John R. Bury and Mr. Boris H. Lakusta argued for the petitioner Southern California Edison Co.; Mrs. Mary Moran Pajalich argued for the petitioner Public Utilities Commission of the State of California; Mr. Peter H. Schiff, Attorney, argued for the respondent Federal Power Commission; and Mr. John W. Cragun argued for the intervenor, City of Colton, California.

In the United States Court of Appeals for the Ninth Circuit

Before: CHAMBERS, MERRILL and BROWNING, *Circuit Judges.*

*Minute entry of order directing filing of opinion and filing and recording of decree—November 15, 1962*

*Ordered*, That the typewritten opinion and dissenting opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this Court in accordance with the opinions rendered.

In the United States Court of Appeals for the Ninth Circuit

No. 17608

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

UPON PETITION TO REVIEW AND SET ASIDE ORDERS OF THE FEDERAL POWER COMMISSION

*Opinion—November 15, 1962*

Before: CHAMBERS, MERRILL and BROWNING, *Circuit Judges.*

MERRILL, *Circuit Judge:*

This case concerns the right of the Federal Power Commission to regulate the rates at which Southern California Edison Company sells power at wholesale to the City of Colton, California. The commission asserts its right under § 201 of the Federal Power Act, 16 U.S.C. § 824, the pertinent portions of which are set forth in the margin.[1]

The City of Colton is a community of approximately eighteen thousand persons located near San Bernardino in Southern

[1] "(a) It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in sections 824–825r of this title and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of sections 824–824h of this title shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in said sections, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

California. Colton's municipal electric utility system purchases all of its energy from Edison under a contract dated October 1, 1945. The contract was filed with the California Public Utilities Commission and the state commission has exercised jurisdiction over all of Edison's sales to Colton since that time. In the exercise of its jurisdiction, the state commission has, over the protest of Colton, authorized increases in Edison's charges.

On May 9, 1958, Colton filed a petition requesting the Federal Power Commission to assert jurisdiction over the rates charged by Edison. The basis of the petition was that interstate energy was sold to Colton at wholesale and that the rates were therefore subject to Federal Power Commission control under § 201(b) of the Federal Power Act. The petition was opposed by Edison and by the California Public Utilities Commission.

Following hearings before the Federal Power Commission, that commission concluded that it had jurisdiction to regulate the rates in question and entered its order requiring Edison, among other matters, to file its rate schedules and to account for all moneys collected in excess of its July, 1954, rates. Edison has petitioned this court to review and set aside the commission's order. The California commission has joined in that petition.

Edison markets electric energy in central and southern California. It markets no energy outside of the state. It owns and operates a number of steam and hydroelectric generating stations within the state.

Edison also purchases energy generated out-of-state at Hoover, Davis and Parker Dams on the Colorado River. Part of this energy was allocated to Edison by the United States Bureau of Reclamation from Hoover Dam generators in Arizona. In 1958 this source accounted for six per cent of the total electric energy handled by Edison, but none of it was traced to the City of Colton. The remainder of Edison's out-of-state energy supply comes from the Metropolitan Water District of California pursuant to a contract entered into in 1945 to which the United States, acting through the Secretary of the Interior, was a party. Under that contract Edison agreed to take a portion of the district's unused firm energy at specified rates to be paid to the United States for the credit of the district. A collateral contract to which the United States was

not a party provided, among other things, for the transmission of this energy over the district's lines to the district's Camino switching station in California and thence by connection to Edison's 220 kv transmission system at Hayfield in California. It is some of this energy that the commission determined reaches the City of Colton, passing from Hayfield to Edison's Highgrove substation to Colton.[2]

It is apparent that authority over the initial sale to Edison in Nevada is not in issue, for the United States controls the allocation of the supply and, as a party to the resale contract, can oversee the rates. The controversy is confined to the conflicting claims of authority to regulate the wholesale rate to Colton asserted by California and the Federal Power Commission.

Federal Power Commission contends that under § 201(b) it has exclusive authority to regulate rates of all wholesale sales of interstate power. Edison contends that the extension of federal regulation to the rate to Colton would encroach upon subject matter specifically left to regulation by the states under § 201 (a) and (b) as read together in the light of Public Utilities Commission vs. Attleboro Steam & Electric Co., 1927, 273 U.S. 83. These opposing contentions present the issue before us.

Legislative and judicial histories seem to us to make clear the intent and purpose of § 201 (a) and (b). It was intended that states should continue to regulate where such regulation is constitutionally permissible under the commerce clause.

Passage of § 201 (a) and (b) was necessitated by the decision in the Attleboro case in 1927. A regulatory void was created by that decision which it was necessary that Congress fill. That case concerned the attempt of the Rhode Island Commission to regulate the rate at which a local producing company sold power at the Rhode Island border to the Attleboro Company for resale in Massachusetts. The court recognized that, although both Rhode Island and Massachusetts had an interest in the rate charged, their interests were essentially in conflict. In this situation the court held that neither Rhode

[2] This finding is strongly contested. Edison also contends that power generated at Hoover Dam does not fall under § 201, since the Boulder Canyon Project Act, 43 U.S.C. § 617, et seq., applies, and that under the provisions of that act Federal Power Commission is excluded from control over such power. This issue and the factual issue as to whether Hoover power actually reaches Colton we do not decide. For the purposes of our decision, we assume both issues to be determined in favor of Federal Power Commission and Colton.

Island nor Massachusetts could regulate the rate in question without violating the commerce clause; that regulation could only be attained through congressional action. Since Congress had not acted, a regulatory void or gap resulted.

That § 201 (a) and (b) was intended to go no further than to fill the "Attleboro gap" is clear from legislative history. Senate Report No. 621, 74th Congress, First Session, p. 48, states in part:

"Subsection (a) * * * declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission."

That report also provides at page 48:

"The revision has also removed every encroachment upon the authority of the states. The revised bill would impower federal regulations only over those matters which cannot effectively be controlled by the states. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of federal authority over state matters.

* * * * *

"The rate-making powers of the Commission are confined to those wholesale transactions which the Supreme Court held in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (273 US 83) to be beyond the reach of the states."

The Supreme Court also has recognized that § 201 (a) and (b) has such limited application. In *Connecticut Light and Power Company* vs. *Federal Power Commission*, 1945, 324 U.S. 499, at 524, the court refers to its earlier decision in *Jersey Central Power and Light Company* vs. *Federal Power Commission*, 1943, 319 U.S. 61, in this language:

"We held that the 'primary purpose' of the 1935 amendments to the Power Act was to give the Power Commission control of sales of energy across state lines which had been held to be beyond the control of the state of export in *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83."

In determining the extent of the regulatory void created by Attleboro, however (and the consequent scope of federal authority) we must take the holding as Congress would have

understood it as of that date. In *Phillips Petroleum Company* vs. *Wisconsin*, 1954, 347 U.S. 672, 684, the Supreme Court stated, dealing with a similar problem under the Natural Gas Act:

"But it is well settled that the gap referred to is that thought to exist at the time the Natural Gas Act was passed, and the jurisdiction of the Commission is not affected by subsequent decisions of this Court which have somewhat loosened the constitutional restrictions on state activities affecting interstate commerce, in the absence of conflicting federal regulation."[2]

Federal Power Commission contends that the Attleboro holding was founded upon the distinction between wholesale and retail sales of interstate power; that under that holding any state regulation of interstate power at wholesale must fall as in violation of the commerce clause.

While the court did lay emphasis upon this distinction, the issue is not so simple in its solution. The question may be posed thus: Under Attleboro can it be said that in absence of federal regulation this sale to Colton would have to go unregulated by California merely because it was wholesale; and in the face of the fact that California is the only State having any concern with it? Or it may be asked: Under Attleboro can a determination be attributed to Congress, through its failure to regulate this sale, that such sale should go unregulated?

The references to wholesale and retail in Attleboro must be read in context. In that case, one side relied upon *Pennsylvania Gas Company* vs. *Public Service Commission*, 252 U.S. 23; the other relied upon *Missouri* vs. *Kansas Gas Company*, 265 U.S. 298. The court in Attleboro stated, at page 87:

"* * * the controlling question presented is whether the present case comes within the rule of the *Pennsylvania Gas Company* case or that of the *Kansas Gas Company* case upon which the Attleboro Company relies."

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[2] The jurisdictional language of the Natural Gas Act and the Power Act is essentially the same. The Natural Gas Act does not contain the express admonition that Congress intended federal regulation "to extend only to those matters which are not subject to regulation by the States." However, this Court has held that the presence of the express language in one and its absence from the other does not affect the parallel interpretation to be given the two Acts in light of the fact that the same purpose clearly appears in the legislative history of both Acts with their constant reference to Pennsylvania Gas, Kansas Gas and Attleboro. FPC vs. Arizona Edison Co., 9 Cir., 1952, 194 F.2d 679, 682. For the legislative history of the Natural Gas Act, see H.R. Rep. No. 709, 75th Cong., 1st Sess. (1937).

In both those cases, as in Attleboro, there was continuous transmission of power across a state line with the selling company doing business with customers on both sides of that line. The regulation which the sending (Attleboro) or receiving (Pennsylvania Gas) state or both (Kansas Gas) sought to impose could bear upon the ability of the selling company to serve its customers in the other state. The interstate conflict of interest was actual in Kansas Gas while only potential in Pennsylvania Gas and Attleboro, but in all three a multi-state concern with a particular transaction was essential to the factual setting of the case.

In Pennsylvania Gas the sales were retail sales by the transmitting company. In Kansas Gas the sales were at wholesale to distributing companies in the receiving state.

In Pennsylvania Gas it was held that in absence of federal regulation the rates at which the transmitting company sold at retail were subject to regulation by the consuming state, since such retail sales, amounting to local distribution, were essentially local in character.

In Kansas Gas the court held the regulation by both states to be a direct burden on interstate commerce and that the sale and delivery to the distributing companies was "an inseparable part of a transaction in interstate commerce—not local but essentially national in character * * *."

In those two cases, as in Attleboro, there being a multi-state concern with the regulation in question and conflicting state interests in the rate charged, the regulation upon its face would appear to be essentially national. If it was to escape the commerce clause, it was necessary to show that notwithstanding the national interest, the local character should prevail. It was under these circumstances that the determining factor upon the local or national dichotomy became the question of whether the interstate sales were at wholesale or retail.

In the case at bar, however, the sale from which the interstate transmission springs is already under federal control through federal sale of the power to the Metropolitan Water District and direct federal participation in the resale to Edison. Any conceivable conflict of interest among Arizona, Nevada and California with respect to the operation of Colorado River plants and the allocation of energy from them is thus totally subject to federal regulation through the United States' posi-

tion as lessor of the generators at Hoover, Parker and Davis.[4] The only other possibility of multi-state concern with the Edison-Colton sale would seem to rest upon Nevada's desire to protect Edison's customers in that state through securing for them the rate benefit which a profitable rate to Colton would permit. This possibility is nullified by the fact that Edison's sales are all within California. Nevada has no resident customers to protect. While this situation might be subject to change were Edison to begin to operate as a public utility in Nevada, Edison has never so operated in the past and has no present plans to expand its sales beyond the borders of the southern portion of California. It would be pure speculation to predict that it will serve Nevada in the future.

The lack, in this case, of any interstate conflict of interest not already subject to federal regulation is, we feel, decisive. It is one thing to say that where more than one state will feel the impact of a regulation of interstate energy, the states may regulate only sales at retail, since sales at wholesale under these circumstances remain essentially national rather than local. It is quite another thing to say, as does the Federal Power Commission, that all sales at wholesale are essentially national, irrespective of a complete lack of interest on the part of any other state.

Attleboro, as we read it, does not say this. The multi-state impact of the regulation there in question is clearly pointed out. The court states, at page 90:

"Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local

[4] See 26 F.P.C. 223, 229–230 (1961).

interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."

Attleboro does not stand in isolation upon this problem of state power to regulate interstate commerce. When it was handed down, it was but the last in a long series of cases bearing upon the problem.

Prior to Attleboro, commencing with *Cooley* vs. *Board of Port Wardens*, 1851, 53 U.S. (12 How.) 298, the Supreme Court had dealt with the matter of state regulation from a very practical point of view. Regulation which might at first blush clearly appear to have a very direct impact on what was concededly interstate commerce had been held in absence of federal regulation to be within the regulatory power of the state, for the reason that although some regulation was clearly required, Congress had failed to act. These were cases in which the concern was local, the need for regulation was due to local conditions and the service was not such as to demand uniformity of regulation among the states, but was, rather, such as to permit of a diversity of regulation. Under these circumstances, the burden upon commerce which the state regulation constituted was held to be an indirect one and within the area in which state power to regulate existed concurrently with federal power until such time as Congress occupied the field.

This is illustrated, for example, by language in The Minnesota Rate Cases, 1912, 230 U.S. 352. On page 396 the court points out the distinction between the impact of a direct and an indirect burden:

"If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free."

The court goes on to state, at page 399:

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system

or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

and further, at pages 402–403:

"But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. * * * Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action."

Can it be said that this prior judicial concern with the local need for regulation of interstate commerce has been laid to rest in Attleboro; and that by that opinion there is substituted for all the considerations theretofore regarded as relevant and irrespective of any multi-state concern (in the power area, at least) the simple mechanical test of wholesale-or-retail? Can it be

said that Congress would have so construed Attleboro? We think not.[5]

The cases relied upon by the Federal Power Commission to sustain their jurisdiction are distinguishable because they all involved a possible conflict of interest among two or more states without any federal regulatory authority in a position to resolve such conflicts by controlling the equitable distribution of either the power supply or the power charges among the states concerned. *Illinois Natural Gas Company* vs. *Central Illinois Public Service Co.*, 1942, 314 U.S. 498, was a case in which the local gas conpany, which claimed exemption from state public utilities commission jurisdiction, was a wholly owned subsidiary of an interstate pipeline company. Its function in this interstate system was to receive the gas at the state border, reduce its pressure and transport it to local distributors. In issue was an order of the state commission requiring the local wholesaler to construct facilities to serve a local distributing company not presently supplied by it with natural gas. The state commis-

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[5] Congress was well aware of the Supreme Court's interpretation of the commerce clause as is illustrated by Senator Wheeler's remarks on the constitutionality of the Holding Company part of the bill. He stated: "The criterion of constitutionality of this bill is the existence of the Federal power (*U.S.* v. *D. & H. Co.*, 213 U.S. 366). The Federal power over a given subject may be concurrent with that of the State or it may be exclusive, depending on the nature of the subject to be regulated.

"In *Hall* v. *DeCuir* (95 U.S. 487), the Court said:

"'* * * The States regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the State, their regulation for all purposes may properly be assumed by the State until Congress acts in reference to their foreign or interstate relations. * * * (Examples are found in the regulation of railroads by the States. See Minnesota Rate Cases, 230 U.S. 352)'

"In *Cooley* v. *Philadelphia* (12 How. 299) the Court said:

"'Whatever subjects of this power (over commerce among the several States) are in their nature national, or admit only of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress.' (An example is interstate transportation of natural gas not regulated by Congress, but nevertheless held in *Oklahoma* v. *Kansas etc., Gas Co.* 221 U.S. 229), to be free from State regulation.)

"Certain features of the business of the utility holding and subsidiary operating companies would seem to be of this latter type, and since the business is of an interstate nature, no doubt Federal power exists, and the question is really one as to whether that power is exclusive, or whether, because many instruments of this commerce are local, the power is to be exerted only and to the extent that such instruments are employed in interstate commerce."

sion was held to be without power to issue such an order because "the proposed extension of appellant's facilities is so intimately associated with the commerce, and would so affect its volume moving into the state and distribution among the states, as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself." 314 U.S. 498, 509.

In *Federal Power Commission* vs. *East Ohio Gas Company*, 1950, 338 U.S. 464, the company which the Federal Power Commission sought to subject to its jurisdiction was also, as in Illinois Gas, a subsidiary of an interstate pipeline company distributing gas wholly within one state. Jurisdiction over wholesale rates was not in issue since East Ohio sold gas direct to consumers. Although retail sales only were at stake, Federal Power Commission authority to require East Ohio to keep accounts and submit reports was upheld by finding that East Ohio's facilities were not entitled to the exemption granted facilities used for local distribution since they were part of an interstate chain of large high-pressure lines which had to be nationally controlled in order to preserve " 'equality of opportunity and treatment among the various communities and States concerned.' " 338 U.S. 464, 471, quoting Kansas Gas, supra, 265 U.S. 298, 310.[6]

Finally, in *United States* vs. *Public Utilities Commission of California*, 1953, 345 U.S. 295, the court fused Part I, § 20, of the Power Act with § 201 by deciding that states were forbidden to regulate sales of hydroelectric power for resale in interstate commerce, even if the source of some portion of the power sold originated in federally licensed hydroelectric proj-

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[6] Both of the foregoing cases (as is also true of Jersey Central and Connecticut Light & Power, discussed infra) deal with Federal Power Commission regulation of matters other than the rates at which power is sold, matters over which the scope of federal authority is broader because of the specific federal interests and statutory provisions involved. The court in Illinois Natural Gas Company dealt with the extension of facilities for the transportation of natural gas and relied heavily upon the explicit expression of federal concern with that subject contained in 15 U.S.C. § 717(f). 314 U.S. 498, 505-508. In East Ohio Gas Company the focus was on federal control under 15 U.S.C. § 717(b) of "transportation of natural gas in interstate commerce" as opposed to the "local distribution of natural gas or to the facilities used for such distribution." Any transmission of energy across state lines automatically has multi-state impact with respect to allocation of energy supply, but that particular object of federal concern is effectively handled in this case by the control the United States exercises over which parties receive power from Hoover, Parker and Davis Dams.

ects. The sweeping statements by the court that § 201 left no authority in the states over interstate sales for resale must be read within the factual framework of the case. The dispute between the state public utilities commission and the Federal Power Commission over the right to control the rates at which a California electric company marketing most of its power in that state sold power to the Navy Department and a Nevada county for use in Nevada. Once again a multistate concern was present since both Nevada and California regulatory agencies were interested in protecting their own citizens. Similarly, the federal government was concerned in keeping the rates at the lowest possible level for Navy use. Indeed, the dispute arose precisely because the company attempted to require the Navy and the Nevada county to adhere to a new schedule of increased rates granted by the California commission.

If the court's broad declarations (that the entire field of interstate wholesale transactions of electric energy was placed under the Federal Power Commission's jurisdiction) are to be held controlling apart from their factual context, federal regulation would govern the rates of sales between two companies wholly engaged in intrastate business and of concern to no state other than the one in which they occur. For example, in this case, were Colton to have some unused energy which it desired to sell to a nearby community such as San Bernardino for distribution to local consumers, the Federal Power Commission could intervene to set the rate of that sale regardless of the fact that only the two communities would be affected by the rate. Subsequent resales by San Bernardino to Riverside and by Riverside to Pomona would be equally subject to federal regulation although any interstate interest would be lacking. No case has yet presented such a set of circumstances to the court. We do not feel that it would go so far as to extend the language of Public Utilities Commission of California to the circumstances described above, especially in the light of its opinion in Connecticut Light & Power Co., discussed infra.

Thus, in each of these cases, as well as in the Attleboro-triad, an interstate conflict of interest was prominent on the facts. When this conflict, which was the essence of the national character of the regulation at stake, was coupled with the lack of

any federal supervision of the conflict, the need for federal intervention, spelled out by § 201, was clear.

The significance of the presence of some form of federal control where muti-state concern with a power transaction for resale in interstate commerce exists may be seen in the contrasting cases of *Jersey Central Power & Light Co.* vs. *Federal Power Commission*, 1943, 319 U.S. 64, *Connecticut Light & Power Co.* vs. *Federal Power Commission*, 1945, 324 U.S. 515 (cases dealing not with rate regulation, but with other subjects of power commission jurisdiction). In *Jersey Central* one of the issues was whether the company was a public utility within the definition of the Federal Power Act as an owner or operator of facilities for the transmission of electric energy in interstate commerce. The company owned and operated transmission lines located wholly within New Jersey, but delivered substantial power to the Public Service Company which, in turn, delivered some of it to a New York company for consumption in New York. The company argued that the arrangements by which energy passed to New York did not make it a public utility because its transmission and sale of power to Public Service Company was an intrastate transaction. The court, interpreting § 201, said:

"The purpose of this act was primarily to regulate the rates and charges of the interstate energy. If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile." 319 U.S. 61, 71–72.

In Connecticut Light, the question was whether the Federal Power Commission had the right to regulate the accounting practices of a company whose facilities were used for local distribution of power. The power included electric energy purchased from another Connecticut concern but transmitted from Massachusetts. One of the company's customers was a municipality which resold a minute part of its purchase for export from the state. Federal control of the interstate conflict of interest potential in the transmission of Massachusetts power to Connecticut was already established, however, and in dispute was the necessity for extending it further to encompass the remainder of the company's business, which lacked

any vital aspect of multi-state concern. The court distinguished Jersey Central by stating:

"Here, however, the federal authority to fix the sale price of the energy coming from Massachusetts in interstate commerce attaches and presumably has been or at least may be exercised pursuant to the Jersey Central holding before the energy reaches this company. What petitioner does or fails to do is only after the incidence of federal regulation and can in no way frustrate it." 324 U.S. 515, 524.

We conclude that a state may regulate an interstate sale for resale where, as here, the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction. We therefore find that the Federal Power Commission has no authority under § 201(b) to regulate the rate at which Edison sells to the City of Colton.

Accordingly, the order of the Federal Power Commission is hereby set aside.

BROWNING, *Circuit Judge*, dissenting:

As the Court states, the Federal Power Act was passed by Congress explicitly to fill the "regulatory gap" created by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*[1] In *Attleboro* the Supreme Court interpreted its earlier decisions as sustaining state authority to regulate "the furnishing of gas to local consumers" in interstate commerce, but denying state power to regulate sales of gas "in wholesale quantities, not to consumers, but to distributing companies for resale to consumers."[2]

This, in any event, was the reading placed upon *Attleboro* by the Congress while considering the Act. It was repeatedly stated in the legislative proceedings that *Attleboro*, and the cases which it followed, had drawn the line separating federal and state constitutional authority between sales at "wholesale" or for "resale," on the one hand, and "local" sales at "retail" or to the "consumer," on the other.[3] The language of Sec-

[1] 273 U.S. 83 (1927).

[2] 273 U.S. at 88–89.

[3] The following are examples of these references, and also of descriptions of the statutory grant of power in the same terms: Hearings on H.R. 5423, House Comm. on Interstate and Foreign Commerce, 74th Cong., 1st Sess. (1935), pp. 96, 384, 402, 421 ff., 435, 497, 498, 518, 521 ff., 576, 1639, 1679, 2143, 2154; S. Rep. No. 621, 74th Cong., 1st Sess., pp. 17, 48; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 7, 26; 79 Cong. Rec., 74th Cong., 1st Sess. (1935), pp. 8431, 8444.

tion 201(b) reads naturally in terms of this distinction, stating that the Act is to apply to sales "at wholesale in interstate commerce" (defined as "sales for resale"), and is not to apply "to any other sale."

The Supreme Court has described the holding in *Attleboro* and its predecessors in terms of the same flat distinction between sales for resale and sales for consumption,[4] and has said that Congress so understood them in enacting the Federal Power Act. In *United States* v. *Public Utilities Commission* the Court said, "Congress interpreted that case [*Attleboro*] as prohibiting state control of wholesale rates in interstate commerce for resale, and so armed the Federal Power Commission with precisely that power."[5]

The courts have uniformly read Section 201(b) as granting the federal Commission jurisdiction over all wholesales in interstate commerce, leaving control of sales at retail to the states.[6] Cases under the Natural Gas Act, concededly applicable here, are to the same effect. As the Supreme Court said in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive uses. No exceptions were made in either category for particular uses, quantities or otherwise."[7] It is indisputable that sales at retail in interstate commerce were made subject to regulation by the state and are beyond the jurisdiction of the federal Commission even though conflicting state interests might be involved.[8] It seems clear that a similarly unqualified grant of exclusive jurisdiction over sales at wholesale in interstate commerce was vested in the Commission.

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[4] *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 303 (1953); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 470 n. 10 (1950); *Panhandle E. Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507, 514 (1947). See also *Hartford Elec. Light Co.* v. *FPC*, 131 F. 2d 953, 964 (2d Cir. 1942).

[5] *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 308 (1953). See also *Connecticut Power Co.* v. *FPC*, 324 U.S. 515, 526 (1945). Cf. *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 471–73 (1950).

[6] *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 311 (1953); *Wisconsin* v. *FPC*, 201 F. 2d 183, 185 n. 1 (D.C. Cir. 1952); *Wisconsin-Michigan Power Co.* v. *FPC*, 197 F. 2d 472 (7th Cir. 1952).

[7] *Panhandle E. Pipe Line Co* v. *Public Serv. Comm'n*, 332 U.S. 507, 517 (1947). See also *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682–84 (1954); *Panhandle E. Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951); *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Comm'n*, 314 U.S. 498, 506–08 (1940).

[8] *Panhandle E. Pipe Line Co.* v. *Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951); *Panhandle E. Pipe Line Co.* v. *Public Serv. Comm'n*, 332 U.S. 507 (1947). This, as the court points out, was true in *Pennsylvania Gas Co.* v. *Public Serv. Comm'n*, 252 U.S. 23 (1920).

This sharp and simple division of regulatory power was not conditioned by the declaration of Section 201(a) that federal regulation is "to extend only to those matters which are not subject to regulation by the States." This general declaration of policy would be relevant "in resolving any ambiguity or indefiniteness in the specific provisions" of the Act, but it "cannot nullify a clear and specific grant of jurisdiction." [9] Before Congress it was "spoken of only as protecting state regulation of local affairs, including rates of intrastate and interstate-for-consumption sales." [10] "To conceive of it now as a benchmark of the Commission's power, or an affirmation of state authority over any interstate sales for resale, would be to speculate about a congressional purpose for which there is no support." [11]

Of course "literalness may strangle meaning," [12] and a statute is to be read in the light of its purpose. But fixing a clear and certain boundary between federal and state jurisdiction to regulate interstate sales of power, so that its precise location need not be fought out case by case in litigation, is in itself an important objective of legislative policy. As has been said of the parallel provisions of the Natural Gas Act, "Congress undertook to regulate a defined class of natural gas distribution, without the necessity, where Congress had not acted, of drawing the precise line between state and federal power by the litigation of particular cases." [13]

To hold that sales of power at wholesale in interstate commerce are not subject to federal Commission jurisdiction unless they involve an "interstate conflict of interest not already subject to federal regulation," can only create troublesome problems. [14] Since an existing conflict between state regulatory

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[9] *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 527 (1945). See also *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 310 (1953).

[10] *United States* v. *Public Util. Comm'n*, 345 U.S. 295, 309 (1953).

[11] 345 U.S. at 311.

[12] *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946).

[13] *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Comm'n*, 314 U.S. 498, 507-08 (1940). See also *Wisconsin* v. *FPC*, 201 F. 2d 183, 185 n. 1 (D.C. Cir. 1952).

[14] In *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Comm'n*, 314 U.S. 498, 502, 508 (1940), the Court suggests that the federal Commission's authority extends to sales of gas for resale following other sales for resale of the same energy which are within the Commission's jurisdiction. The same understanding of the coverage of the Act is reflected in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682 n. 10 (1954), where the court refers to the comment of the General Solicitor of the National Association of Railroad and Utilities Commissioners that the purpose of certain changes ultimately included in the Act was "to make certain that the bill will apply to all intercompany sales of natural gas at wholesale, even though the sale be from one company to another company which will resell to another corporation before the gas is finally sold to the public." Hearings before

agencies is not a prerequisite to jurisdiction of the federal Commission,[15] it is not clear why an existing (rather than potential) conflict of state interests should be required. Further, it is not clear whether the extent of the conflict of interest is relevant: would federal jurisdiction attach to the Colton contract if Edison sold one Nevada customer a small amount of power; if not, how much more would be required? Would it make a difference if power sold by Edison in a state other than California were also traceable to a federal generator so that the first sale was controlled by an agency of the federal government? If at some future time federal jurisdiction were to attach to the Colton contract because of sales of power by Edison in states other than California, would the federal jurisdiction over the Colton contract be dependent upon continuance of these sales? Does the requirement of interstate conflict also apply to federal jurisdiction over interstate transmission; or is it limited to interstate sales? [16] And if no existing conflict of interest between states is involved, is the interstate sale to be left unregulated if the state concerned does not undertake to regulate it?

If it is desirable that regulation of contracts like that with Colton be left to the state, the task of modifying Section 201(b) to accomplish that purpose is one for Congress. Congress could move the jurisdictional line without obscuring it; Congress could require state-by-state assumption of regulatory responsibility before federal controls were withdrawn.[17]

[File endorsement omitted]

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House Comm. on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess. 22.

[15] Only California had sought to regulate the rates involved in *United States* v. *Public Util. Comm'n*, 345 U.S. 295 (1953). In that case as in this Nevada withheld a potential claim to regulatory jurisdiction.

[16] The Court's discussion of *Illinois Natural Gas Co.* v. *Central Illinois Pub. Serv. Comm'n*, 314 U.S. 498 (1942), and *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), suggests as much, though it is difficult to find a basis for such a distinction in the statute itself.

[17] In a comparable situation the Supreme Court adhered to the jurisdictional test of the Natural Gas Act [*FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950)] and Congress then enacted a clear and limited exception in favor of "any person engaged in * * * the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State * * * provided that the rates * * * of such persons * * * be subject to regulation by State commission. * * * A certification from such State commission to the Federal Power Commission that such State Commission has regulatory jurisidiction over [such] rates * * * and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction." 15 U.S.C.A. § 717(c). See S. Rep. No. 817, 83d Cong., 2d Sess.

In United States Court of Appeals for the Ninth Circuit

No. 17608

SOUTHERN CALIFORNIA EDISON COMPANY, PETITIONER

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

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PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONER

*vs.*

FEDERAL POWER COMMISSION, RESPONDENT

*Decree—filed November 16, 1962*

Before: CHAMBERS, MERRILL AND BROWNING, *Circuit Judges*

This cause came on to be heard upon the petitions of the Southern California Edison Company, filed November 6, 1961 and Public Utilities Commission of the State of California, filed November 7, 1961, to review and set aside orders of the Federal Power Commission of July 31, 1961 and September 14, 1961.

The Court heard argument of respective counsel on June 15, 1962, and has considered the briefs and transcript of record filed in this cause. On November 15, 1962, the Court being fully advised in the premises, handed down its decision, in conformity thereto, it is hereby

*Ordered, Adjudged and Decreed*, By the United States Court of Appeals for the Ninth Circuit that the Order of the Federal Power Commission herein of July 31, 1961 be and hereby is set aside.

[File endorsement omitted]

[Clerk's Certificate to foregoing transcript omitted in printing]

Supreme Court of the United States October Term, 1962

No. 808

FEDERAL POWER COMMISSION, PETITIONER

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.

*Order allowing certiorari—April 1, 1963*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with No. 822 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States October Term, 1962

No. 822

CITY OF COLTON, CALIFORNIA, PETITIONER

*vs.*

SOUTHERN CALIFORNIA EDISON COMPANY, ET AL.

*Order allowing certiorari—April 1, 1963*

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is consolidated with No. 808 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U.S. GOVERNMENT PRINTING OFFICE: 1963